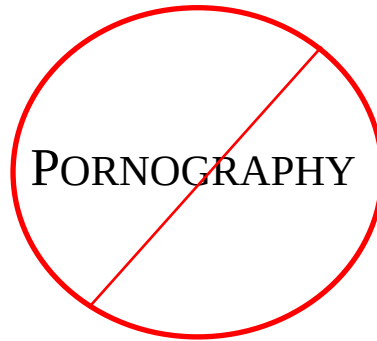




This is a collection of six judicial decisions that particularly were aimed at or negatively affected the gay community as it relates to obtaining information, communications, magazines, and other items that the governments decided to make illegal by labeling them as pornographic.

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Roth v US

354 US 476

1957

Roth v. United States, 354 U.S. 476 (1957)

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Annotation

PRIMARY HOLDING

Later superseded by another decision, this ruling held that the First Amendment does not protect obscene speech.

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Syllabus

U.S. Supreme Court

Roth v. United States, 354 U.S. 476 (1957)

Roth v. United States

No. 582

Argued April 22, 1957

Decided June 24, 1957*

354 U.S. 476

Syllabus

1. In the *Roth* case, the constitutionality of 18 U.S.C. § 1461, which makes punishable the mailing of material that is "obscene, lewd, lascivious, or filthy . . . or other publication of an indecent character," and Roth's conviction thereunder for mailing an obscene book and obscene circulars and advertising, are sustained. Pp. 354 U. S. 479-494.

2. In the *Albert* case, the constitutionality of § 311 of West's California Penal Code Ann., 1955, which, *inter alia*, makes it a misdemeanor to keep for sale, or to advertise, material that is "obscene or indecent," and Alberts' conviction thereunder for lewdly keeping for sale obscene and indecent books and for writing, composing, and publishing an obscene advertisement of them, are sustained. Pp. 354 U. S. 479-494.

3. Obscenity is not within the area of constitutionally protected freedom of speech or press either (1) under the First Amendment, as to the Federal Government, or (2) under the Due Process Clause of the Fourteenth Amendment, as to the States. Pp. 354 U. S. 481-485.

(a) In the light of history, it is apparent that the unconditional phrasing of the First Amendment was not intended to protect every utterance. Pp. 354 U. S. 482-483.

(b) The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people. P. 354 U. S. 484.

(c) All ideas having even the slightest redeeming social importance -- unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion -- have the full protection of the guaranties, unless excludable because they encroach upon the limited area of more important interests; but implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance. Pp. 354 U. S. 484-485.

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4. Since obscenity is not protected, constitutional guaranties were not violated in these cases merely because, under the trial judges' instructions to the juries, convictions could be had without proof either that the obscene material would perceptibly create a clear and present danger of antisocial conduct, or probably would induce its recipients to such conduct. *Beauharnais v. Illinois*, 343 U. S. 250. Pp. 354 U. S. 485-490.

(a) Sex and obscenity are not synonymous. Obscene material is material which deals with sex in a manner appealing to prurient interest -- *i.e.*, material having a tendency to excite lustful thoughts. P. 354 U. S. 487.

(b) It is vital that the standards for judging obscenity safeguard the protection of freedom of speech and press for material which does not treat sex in a manner appealing to prurient interest. Pp. 354 U. S. 487-488.

(c) The standard for judging obscenity, adequate to withstand the charge of constitutional infirmity, is whether, to the average person, applying contemporary community standards, the dominant theme of the material, taken as a whole, appeals to prurient interest. Pp. 354 U. S. 488-489.

(d) In these cases, both trial courts sufficiently followed the proper standard and used the proper definition of obscenity. Pp. 354 U. S. 489-490.

5. When applied according to the proper standard for judging obscenity, 18 U.S.C. § 1461, which makes punishable the mailing of material that is "obscene, lewd, lascivious, or filthy . . . or other publication of an indecent character," does not (1) violate the freedom of speech or press guaranteed by the First Amendment, or (2) violate the constitutional requirements of due process by failing to provide reasonably ascertainable standards of guilt. Pp. 354 U. S. 491-492.

6. When applied according to the proper standard for judging obscenity, § 311 of West's California Penal Code Ann., 1955, which, *inter alia*, makes it a misdemeanor to keep for sale or to advertise material that is "obscene or indecent," does not (1) violate the freedom of speech or press guaranteed by the Fourteenth Amendment against encroachment by the States, or (2) violate the constitutional requirements of due process by failing to provide reasonably ascertainable standards of guilt. Pp. 354 U. S. 491-492.

7. The federal obscenity statute, 18 U.S.C. § 1461, punishing the use of the mails for obscene material, is a proper exercise of the postal power delegated to Congress by Art. I, § 8, cl. 7, and it

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does not unconstitutionally encroach upon the powers reserved to the States by the Ninth and Tenth Amendments. Pp. 354 U. S. 492-493.

8. The California obscenity statute here involved is not repugnant to Art. I, § 8, cl. 7, since it does not impose a burden upon, or interfere with, the federal postal functions -- even when applied to a mail-order business. Pp. 354 U. S. 493-494.

237 F.2d 796, affirmed.

138 Cal. App. 2d Supp. 909, 292 P.2d 90, affirmed.

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Opinions

Opinions & Dissents

U.S. Supreme Court

Roth v. United States, 354 U.S. 476 (1957)

Roth v. United States

No. 582

Argued April 22, 1957

Decided June 24, 1957 354 U.S. 476ast|>*

354 U.S. 476

CERTIORARI TO THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Syllabus

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237 F.2d 796, affirmed.

138 Cal. App. 2d Supp. 909, 292 P.2d 90, affirmed.

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MR. JUSTICE BRENNAN delivered the opinion of the Court.

The constitutionality of a criminal obscenity statute is the question in each of these cases. In *Roth*, the primary constitutional question is whether the federal obscenity statute [Footnote 1] violates the provision of the First Amendment that "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ." In *Alberts*, the primary constitutional question is whether the obscenity provisions of the California Penal Code [Footnote 2] invade the freedoms of speech and press as they may be incorporated in

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the liberty protected from state action by the Due Process Clause of the Fourteenth Amendment.

Other constitutional questions are: whether these statutes violate due process, [Footnote 3] because too vague to support conviction for crime; whether power to punish speech and press offensive to decency and morality is in the States alone, so that the federal obscenity statute violates the Ninth and Tenth Amendments (raised in *Roth*), and whether Congress

statute violates the Ninth and Tenth Amendments (raised in *Roth*), and whether Congress, by enacting the federal obscenity statute, under the power delegated by Art. I, § 8, cl. 7, to establish post offices and post roads, preempted the regulation of the subject matter (raised in *Alberts*).

Roth conducted a business in New York in the publication and sale of books, photographs and magazines. He used circulars and advertising matter to solicit sales. He was convicted by a jury in the District Court for the Southern District of New York upon 4 counts of a 26-count indictment charging him with mailing obscene circulars and advertising, and an obscene book, in violation of the federal obscenity statute. His conviction was affirmed by the Court of Appeals for the Second Circuit. [Footnote 4] We granted certiorari. [Footnote 5]

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Alberts conducted a mail-order business from Los Angeles. He was convicted by the Judge of the Municipal Court of the Beverly Hills Judicial District (having waived a jury trial) under a misdemeanor complaint which charged him with lewdly keeping for sale obscene and indecent books, and with writing, composing and publishing an obscene advertisement of them, in violation of the California Penal Code. The conviction was affirmed by the Appellate Department of the Superior Court of the State of California in and for the County of Los Angeles. [Footnote 6] We noted probable jurisdiction. [Footnote 7]

The dispositive question is whether obscenity is utterance within the area of protected speech and press. [Footnote 8] Although this is the first time the question has been squarely presented to this Court, either under the First Amendment or under the Fourteenth Amendment, expressions found in numerous opinions indicate that this Court has always assumed that obscenity is not protected by the freedoms of speech and press. *Ex parte Jackson*, 96 U. S. 727, 96 U. S. 736-737; *United States v. Chase*, 135 U. S. 255, 135 U. S. 261; *Robertson v. Baldwin*, 165 U. S. 275, 165 U. S. 281; *Public Clearing House v. Coyne*, 194 U. S. 497, 194 U. S. 508; *Hoke v. United States*, 227 U. S. 308, 227 U. S. 322; *Near v. Minnesota*, 283 U. S. 697, 283 U. S. 716; *Chaplinsky v. New Hampshire*, 315 U. S. 568, 315 U. S. 571-572; *Hannegan v. Esquire, Inc.*, 327 U. S. 146, 327 U. S. 158; *Winters v. New York*, 333 U. S. 507, 333 U. S. 510; *Beauharnais v. Illinois*, 343 U. S. 250, 343 U. S. 266. [Footnote 9]

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The guaranties of freedom of expression [Footnote 10] in effect in 10 of the 14 States which by 1792 had ratified the Constitution, gave no absolute protection for every utterance.

Thirteen of the 14 States provided for the prosecution of libel, [Footnote 11] and all of those States made either blasphemy or profanity, or both, statutory crimes. [Footnote 12] As early as

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1712, Massachusetts made it criminal to publish "any filthy, obscene, or profane song, pamphlet, libel or mock sermon" in imitation or mimicking of religious services. Acts and Laws of the Province of Mass. Bay, c. CV, § 8 (1712), Mass.Bay Colony Charters & Laws 399 (1814). Thus, profanity and obscenity were related offenses.

In light of this history, it is apparent that the unconditional phrasing of the First Amendment was not intended to protect every utterance. This phrasing did not prevent this Court from concluding that libelous utterances are not within the area of constitutionally protected speech. *Beauharnais v. Illinois*, 343 U. S. 250, 343 U. S. 266. At the time of the adoption of the First Amendment, obscenity law was not as fully developed as libel law, but there is sufficiently contemporaneous evidence to show that obscenity, too, was outside the protection intended for speech and press. [Footnote 13]

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The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people. This objective was made explicit as early as 1774 in a letter of the Continental Congress to the inhabitants of Quebec:

"The last right we shall mention regards the freedom of the press. The importance of this consists, besides the advancement of truth, science, morality, and arts in general, in its diffusion of liberal sentiments on the administration of Government, its ready communication of thoughts between subjects, and its consequential promotion of union among them, whereby oppressive officers are shamed or intimidated into more honourable and just modes of conducting affairs."

¹ Journals of the Continental Congress 108 (1774).

All ideas having even the slightest redeeming social importance -- unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion -- have the full protection of the guaranties, unless excludable because they encroach upon the limited area of more important interests. [Footnote 14] But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance. This rejection for

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that reason is mirrored in the universal judgment that obscenity should be restrained, reflected in the international agreement of over 50 nations, [Footnote 15] in the obscenity laws of all of the 48 States, [Footnote 16] and in the 20 obscenity laws enacted by the Congress from 1842 to 1956. [Footnote 17] This is the same judgment expressed by this Court in *Chaplinsky v. New Hampshire*, 315 U. S. 568, 315 U. S. 571-572:

"... There are certain well defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. *These include the lewd and obscene. . . . It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. . . .*"

(Emphasis added.) We hold that obscenity is not within the area of constitutionally protected speech or press.

It is strenuously urged that these obscenity statutes offend the constitutional guaranties because they punish

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incitation to impure sexual *thoughts*, not shown to be related to any overt antisocial conduct which is or may be incited in the persons stimulated to such *thoughts*. In *Roth*, the trial Judge instructed the jury:

"The words 'obscene, lewd and lascivious' as used in the law, signify that form of immorality which has relation to sexual impurity and has a tendency to excite lustful *thoughts*."

(Emphasis added.) In *Alberts*, the trial judge applied the test laid down in *People v. Wepplo*, 78 Cal. App. 2d Supp. 959, 178 P.2d 853, namely, whether the material has "a substantial tendency to deprave or corrupt its readers by inciting lascivious *thoughts* or arousing lustful desires." (Emphasis added.) It is insisted that the constitutional guaranties are violated because convictions may be had without proof either that obscene material will perceptibly create a clear and present danger of anti-social conduct, [Footnote 18] or will probably induce its recipients to such conduct. [Footnote 19] But, in light of our holding that obscenity is not protected speech, the complete answer to this argument is in the holding of this Court in *Beauharnais v. Illinois*, *supra*, at 343 U. S. 266:

"Libelous utterances not being within the area of constitutionally protected speech, it is unnecessary, either for us or for the State courts, to consider the issues behind the phrase 'clear and present danger.' Certainly no one would contend that obscene speech,

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for example, may be punished only upon a showing of such circumstances. Libel, as we have seen, is in the same class."

However, sex and obscenity are not synonymous. Obscene material is material which deals with sex in a manner appealing to prurient interest. [Footnote 20] The portrayal of sex, *e.g.*, in art, literature and scientific works, [Footnote 21] is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press. Sex, a great and mysterious motive force in human life, has indisputably been a subject of absorbing interest to mankind through the ages; it is one of the vital problems of human interest and public concern. As to all such problems,

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this Court said in *Thornhill v. Alabama*, 310 U. S. 88, 310 U. S. 101-102:

"The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully *all matters of public concern* without previous restraint or fear of subsequent punishment. The exigencies of the colonial period and the efforts to secure freedom from oppressive administration developed a broadened conception of these liberties as adequate to supply the public need for *information and education with respect to the significant issues of the times*. . . . Freedom of discussion, if it would fulfill its historic function in this nation, must embrace *all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period*."

(Emphasis added.)

The fundamental freedoms of speech and press have contributed greatly to the development and wellbeing of our free society and are indispensable to its continued growth. [Footnote 22] Ceaseless vigilance is the watchword to prevent their erosion by Congress or by the States. The door barring federal and state intrusion into this area cannot be left ajar; it must be kept tightly closed, and opened only the slightest crack necessary to prevent encroachment upon more important interests. [Footnote 23] It is therefore vital that the standards for judging obscenity safeguard the protection of freedom of speech and

press for material which does not treat sex in a manner appealing to prurient interest.

The early leading standard of obscenity allowed material to be judged merely by the effect of an isolated

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excerpt upon particularly susceptible persons. *Regina v. Hicklin*, [1868] L.R. 3 Q.B. 360. [Footnote 24] Some American courts adopted this standard, [Footnote 25] but later decisions have rejected it and substituted this test: whether, to the average person, applying contemporary community standards, the dominant theme of the material, taken as a whole, appeals to prurient interest. [Footnote 26] The *Hicklin* test, judging obscenity by the effect of isolated passages upon the most susceptible persons, might well encompass material legitimately treating with sex, and so it must be rejected as unconstitutionally restrictive of the freedoms of speech and press. On the other hand, the substituted standard provides safeguards adequate to withstand the charge of constitutional infirmity.

Both trial courts below sufficiently followed the proper standard. Both courts used the proper definition of obscenity. In addition, in the *Alberts* case, in ruling on a motion to dismiss, the trial judge indicated that, as the

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trier of facts, he was judging each item as a whole as it would affect the normal person, [Footnote 27] and, in *Roth*, the trial judge instructed the jury as follows:

"... The test is not whether it would arouse sexual desires or sexual impure thoughts in those comprising a particular segment of the community, the young, the immature or the highly prudish or would leave another segment, the scientific or highly educated or the so-called worldly wise and sophisticated indifferent and unmoved. . . ."

"* * * *"

"The test in each case is the effect of the book, picture or publication considered as a whole not upon any particular class, but upon all those whom it is likely to reach. In other words, you determine its impact upon the average person in the community. The books, pictures and circulars must be judged as a whole, in their entire context, and you are not to consider detached or separate portions in reaching a conclusion. You judge the circulars, pictures and publications which have been put in evidence by present-day standards of the community. You may ask yourselves does it offend the common conscience of the community by present-day standards."

" * * * * "

"In this case, ladies and gentlemen of the jury, you and you alone are the exclusive judges of what the common conscience of the community is, and, in determining that conscience, you are to consider the community as a whole, young and old, educated and uneducated, the religious and the irreligious -- men, women and children. "

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It is argued that the statutes do not provide reasonably ascertainable standards of guilt, and therefore violates the constitutional requirements of due process. *Winters v. New York*, 333 U. S. 507. The federal obscenity statute makes punishable the mailing of material that is "obscene, lewd, lascivious, or filthy . . . or other publication of an indecent character." [Footnote 28] The California statute makes punishable, *inter alia*, the keeping for sale or advertising material that is "obscene or indecent." The thrust of the argument is that these words are not sufficiently precise, because they do not mean the same thing to all people, all the time, everywhere.

Many decisions have recognized that these terms of obscenity statutes are not precise. [Footnote 29] This Court, however, has consistently held that lack of precision is not itself offensive to the requirements of due process. ". . . [T]he Constitution does not require impossible standards"; all that is required is that the language "conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. . . ." *United States v. Petrillo*, 332 U. S. 1, 332 U. S. 7-8. These words, applied according to the proper standard for judging obscenity, already discussed, give adequate warning of the conduct proscribed, and mark

". . . boundaries sufficiently distinct for judges and juries fairly to administer the law. . . . That there may be marginal cases in which it is difficult to determine the side of the line on

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which a particular fact situation falls is no sufficient reason to hold the language too ambiguous to define a criminal offense. . . ."

Id. at 332 U. S. 7. See also *United States v. Harriss*, 347 U. S. 612, 347 U. S. 624, n. 15; *Boyce Motor Lines, Inc. v. United States*, 342 U. S. 337, 342 U. S. 340; *United States v. Ragen*, 314 U. S. 513, 314 U. S. 523-524; *United States v. Wurzbach*, 280 U. S. 396; *Hygrade Provision Co. v. Sherman*, 266 U. S. 497; *Fox v. Washington*, 236 U. S. 273; *Nash v. United States*, 306 U. S. 408. [Footnote 30]

In summary, then, we hold that these statutes, applied according to the proper standard for judging obscenity, do not offend constitutional safeguards against convictions based upon protected material, or fail to give men in acting adequate notice of what is prohibited.

Roth's argument that the federal obscenity statute unconstitutionally encroaches upon the powers reserved by the Ninth and Tenth Amendments to the States and to the people to punish speech and press where offensive to decency and morality is hinged upon his contention that obscenity is expression not excepted from the sweep of the provision of the First Amendment that "Congress shall make *no law* . . . abridging the freedom of speech, or of the press. . . ." (Emphasis added.) That argument falls in light of our holding that obscenity is not expression protected by the First Amendment. [Footnote 31] We

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therefore hold that the federal obscenity statute punishing the use of the mails for obscene material is a proper exercise of the postal power delegated to Congress by Art. I, § 8, cl. 7. [Footnote 32] In *United Public Workers v. Mitchell*, 330 U. S. 75, 330 U. S. 95-96, this Court said:

" . . . The powers granted by the Constitution to the Federal Government are subtracted from the totality of sovereignty originally in the states and the people. Therefore, when objection is made that the exercise of a federal power infringes upon rights reserved by the Ninth and Tenth Amendments, the inquiry must be directed toward the granted power under which the action of the Union was taken. If granted power is found, necessarily the objection of invasion of those rights, reserved by the Ninth and Tenth Amendments, must fail. . . ."

Alberts argues that, because his was a mail-order business, the California statute is repugnant to Art. I, § 8, cl. 7, under which the Congress allegedly preempted the regulatory field by enacting the federal obscenity statute punishing the mailing or advertising by mail of obscene material. The federal statute deals only with actual

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mailing; it does not eliminate the power of the state to punish "keeping for sale" or "advertising" obscene material. The state statute in no way imposes a burden or interferes with the federal postal functions.

" . . . The decided cases which indicate the limits of state regulatory power in relation to the

federal mail service involve situations where state regulation involved a direct, physical interference with federal activities under the postal power or some direct, immediate burden on the performance of the postal functions. . . ."

Railway Mail Assn. v. Corsi, 326 U. S. 88, 326 U. S. 96.

The judgments are

Affirmed.

* Together with No. 61, *Albert v. California*, appeal from the Superior Court of California, Los Angeles County, Appellate Department, argued and decided on the same dates.

[Footnote 1]

The federal obscenity statute provided, in pertinent part:

"Every obscene, lewd, lascivious, or filthy book, pamphlet, picture, paper, letter, writing, print, or other publication of an indecent character, and --"

"* * * *"

"Every written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, or how, or from whom, or by what means any of such mentioned matters, articles, or things may be obtained or made, . . . whether sealed or unsealed . . ."

"* * * *"

"Is declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier."

"Whoever knowingly deposits for mailing or delivery, anything declared by this section to be nonmailable, or knowingly takes the same from the mails for the purpose of circulating or disposing thereof, or of aiding in the circulation or disposition thereof, shall be fined not more than \$5,000 or imprisoned not more than five years, or both."

18 U.S.C. § 1461.

The 1955 amendment of this statute, 69 Stat. 13, is not applicable to this case.

[Footnote 2]

The California Penal Code provides, in pertinent part:

"Every person who willfully and lewdly, either:"

"* * * *"

"3. Writes, composes, stereotypes, prints, publishes, sells, distributes, keeps for sale, or exhibits any obscene or indecent writing, paper, or book; or designs, copies, draws, engraves, paints, or otherwise prepares any obscene or indecent picture or print; or molds, cuts, casts, or otherwise makes any obscene or indecent figure; or,"

"4. Writes, composes, or publishes any notice or advertisement of any such writing, paper, book, picture, print or figure; . . ."

"* * * *"

"6. . . . is guilty of a misdemeanor. . . ."

West's Cal.Penal Code Ann., 1955, § 311.

[Footnote 3]

In *Roth*, reliance is placed on the Due Process Clause of the Fifth Amendment, and, in *Alberts*, reliance is placed upon the Due Process Clause of the Fourteenth Amendment.

[Footnote 4]

237 F.2d 796.

[Footnote 5]

352 U.S. 964. Petitioner's application for bail was granted by MR. JUSTICE HARLAN in his capacity as Circuit Justice for the Second Circuit. 1 L. Ed. 2d 34, 77 Sup.Ct. 17.

[Footnote 6]

138 Cal. App. 2d Supp. 909, 292 P.2d 90. This is the highest state appellate court available to the appellant. Cal.Const., Art. VI, § 5; see *Edwards v. California*, 314 U. S. 160.

[Footnote 7]

352 U.S. 962.

[Footnote 8]

No issue is presented in either case concerning the obscenity of the material involved.

[Footnote 9]

See also the following cases in which convictions under obscenity statutes have been reviewed: *Grimm v. United States*, 156 U. S. 604; *Rosen v. United States*, 161 U. S. 29; *Swearingen v. United States*, 161 U. S. 446; *Andrews v. United States*, 162 U. S. 420; *Price v. United States*, 165 U. S. 311; *Dunlop v. United States*, 165 U. S. 486; *Bartell v. United States*, 227 U. S. 427; *United States v. Limehouse*, 285 U. S. 424.

[Footnote 10]

Del.Const., 1792, Art. I, § 5; Ga.Const., 1777, Art. LXI; Md.Const., 1776, Declaration of Rights, § 38; Mass.Const., 1780, Declaration of Rights, Art. XVI; N.H.Const., 1784, Art. I, § XXII; N.C. Const., 1776, Declaration of Rights, Art. XV; Pa.Const., 1776, Declaration of Rights, Art. XII; S.C.Const., 1778, Art. XLIII; Vt.Const., 1777, Declaration of Rights, Art. XIV; Va. Bill of Rights, 1776, § 12.

[Footnote 11]

Act to Secure the Freedom of the Press (1804), 1 Conn.Pub.Stat.Laws 355 (1808); Del.Const., 1792, Art. I, § 5; Ga.Penal Code, Eighth Div., §VIII (1817), Digest of the Laws of Ga. 364 (Prince 1822); Act of 1803, c. 54, II Md.Public General Laws 1096 (Poe 1888); *Commonwealth v. Kneeland*, 37 Mass. 206, 232 (1838); Act for the Punishment of Certain Crimes Not Capital (1791), N.H.Laws 1792, 253; Act Respecting Libels (1799), N.J.Rev.Laws 411 (1800); *People v. Croswell*, 3 Johns. (N.Y.) 337 (1804); Act of 1803, c. 632, 2 Laws of N.C. 999 (1821); Pa.Const., 1790, Art. IX, § 7; R.I.Code of Laws (1647), Proceedings of the First General Assembly and Code of Laws 44-45 (1647); R.I.Const., 1842, Art. I, § 20; Act of 1804, 1 Laws of Vt. 366 (Tolman 1808); *Commonwealth v. Morris*, 1 Brock. & Hol. (Va.) 176 (1811).

[Footnote 12]

Act for the Punishment of Divers Capital and Other Felonies, Acts and Laws of Conn. 66, 67 (1784); Act Against Drunkenness, Blasphemy, §§ 4, 5 (1737), 1 Laws of Del. 173, 174 (1797); Act to Regulate Taverns (1786), Digest of the Laws of Ga. 512, 513 (Prince 1822); Act of 1723, c. 16, § 1, Digest of the Laws of Md. 92 (Herty 1799); General Laws and Liberties of Mass. Bay, c. XVIII, § 3 (1646), Mass. Bay Colony Charters & Laws 58 (1814); Act of 1782, c. 8, Rev.Stat. of Mass. 741, § 15 (1836); Act of 1798, c. 33, §§ 1, 3, Rev.Stat. of Mass. 741, § 16 (1826); Act for the Punishment of Certain Crimes Not Capital (1791) N H Laws 1792

18 (1793); Act for the Punishment of Certain Crimes Not Capital (1794), N.H.Laws 1792, 252, 256; Act for the Punishment of Profane Cursing and Swearing (1791), N.H.Laws 1792, 258; Act for Suppressing Vice and Immorality, §§ VIII, IX (1798), N.J.Rev.Laws 329, 331 (1800); Act for Suppressing Immorality, § IV (1788), 2 Laws of N.Y. 257, 258 (Jones & Varick 1777-1789); *People v. Ruggles*, 8 Johns. (N.Y.) 290 (1811); Act . . . for the More Effectual Suppression of Vice and Immorality, § III (1741), 1 N.C.Laws 52 (Martin Rev. 1715-1790); Act to Prevent the Grievous Sins of Cursing and Swearing (1700), II Statutes at Large of Pa. 49 (1700-1712); Act for the Prevention of Vice and Immorality, § II (1794), 3 Laws of Pa. 177, 178 (1791-1802); Act to Reform the Penal Laws, §§ 33, 34 (1798), R.I.Laws 1798, 584, 595; Act for the More Effectual Suppressing of Blasphemy and Prophaneness (1703), Laws of S.C. 4 (Grimke 1790); Act, for the Punishment of Certain Capital, and Other High Crimes and Misdemeanors, § 20 (1797), 1 Laws of Vt. 332, 339 (Tolman 1808); Act for the Punishment of Certain Inferior Crimes and Misdemeanors, § 20 (1797), 1 Laws of Vt. 352, 361 (Tolman 1808); Act for the Effectual Suppression of Vice, § 1 (1792), Acts of General Assembly of Va. 286 (1794).

[Footnote 13]

Act Concerning Crimes and Punishments, § 69 (1821), Stat.Laws of Conn. 109 (1824); *Knowles v. State*, 3 Day (Conn.) 103 (1808); Rev.Stat. of 1835, c. 130, § 10, Rev.Stat. of Mass. 740 (1836); *Commonwealth v. Holmes*, 17 Mass. 335 (1821); Rev.Stat. of 1842, c. 113, § 2, Rev.Stat. of N.H. 221 (1843); Act for Suppressing Vice and Immorality, § XII (1798), N.J.Rev.Laws 329, 331 (1800); *Commonwealth v. Sharpless*, 2 S. & R. (Pa.) 91 (1815).

[Footnote 14]

E.g., *United States v. Harriss*, 347 U. S. 612; *Breard v. Alexandria*, 341 U. S. 622; *Teamsters Union v. Hanke*, 339 U. S. 470; *Kovacs v. Cooper*, 336 U. S. 77; *Prince v. Massachusetts*, 321 U. S. 158; *Labor Board v. Virginia Elec. & Power Co.*, 314 U. S. 469; *Cox v. New Hampshire*, 312 U. S. 569; *Schenck v. United States*, 249 U. S. 47.

[Footnote 15]

Agreement for the Suppression of the Circulation of Obscene Publications, 37 Stat. 1511; Treaties in Force 209 (U.S. Dept. State, October 31, 1956).

[Footnote 16]

Hearings before Subcommittee to Investigate Juvenile Delinquency of the Senate Committee on the Judiciary, pursuant to S.Res. 62, 84th Cong., 1st Sess. 49-52 (May 24,

1955).

Although New Mexico has no general obscenity statute, it does have a statute giving to municipalities the power "to prohibit the sale or exhibiting of obscene or immoral publications, prints, pictures, or illustrations." N.M.Stat.Ann., 1953, §§ 14-21-3, 14-21-12.

[Footnote 17]

5 Stat. 548, 566; 11 Stat. 168; 13 Stat. 504, 507; 17 Stat. 302; 17 Stat. 598; 19 Stat. 90; 25 Stat. 187, 188; 25 Stat. 496; 26 Stat. 567, 614-615; 29 Stat. 512; 33 Stat. 705; 35 Stat. 1129, 1138; 41 Stat. 1060; 46 Stat. 688; 48 Stat. 1091, 1100; 62 Stat. 768; 64 Stat. 194; 64 Stat. 451; 69 Stat. 183; 70 Stat. 699.

[Footnote 18]

Schenck v. United States, 249 U. S. 47. This approach is typified by the opinion of Judge Bok (written prior to this Court's opinion in *Dennis v. United States*, 341 U. S. 494) in *Commonwealth v. Gordon*, 66 Pa. D. & C. 101, *aff'd sub nom. Commonwealth v. Feigenbaum*, 166 Pa.Super. 120, 70 A.2d 389.

[Footnote 19]

Dennis v. United States, 341 U. S. 494. This approach is typified by the concurring opinion of Judge Frank in the *Roth* case, 237 F.2d at 801. *See also* Lockhart & McClure, Literature, The Law of Obscenity, and the Constitution, 38 Minn.L.Rev. 295 (1954).

[Footnote 20]

I.e., material having a tendency to excite lustful thoughts. Webster's New International Dictionary (Unabridged, 2d ed., 1949) defines *prurient*, in pertinent part, as follows:

"... Itching; longing; uneasy with desire or longing; of persons, having itching, morbid, or lascivious longings; of desire, curiosity, or propensity, lewd. . . ."

Pruriency is defined, in pertinent part, as follows:

"... Quality of being prurient; lascivious desire or thought...."

See also Mutual Film Corp. v. Industrial Comm'n, 236 U. S. 230, 236 U. S. 242, where this Court said as to motion pictures:

"... They take their attraction from the general interest, eager and wholesome it may be, in their subject, but their interest is not in the subject itself, but in the fact that it is a subject."

their subjects, but a *prurient interest may be excited and appealed to*. . . ."

(Emphasis added.)

We perceive no significant difference between the meaning of obscenity developed in the case law and the definition of the A.L.I., Model Penal Code, § 207.10(2) (Tent.Draft No. 6, 1957), *viz.*:

" . . . A thing is obscene if, considered as a whole, its predominant appeal is to prurient interest, *i.e.*, a shameful or morbid interest in nudity, sex, or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters. . . ."

See Comment, *id.* at 10, and the discussion at page 29 *et seq.*

[Footnote 21]

See, *e.g.*, *United States v. Dennett*, 39 F.2d 564.

[Footnote 22]

Madison's Report on the Virginia Resolutions, 4 Elliot's Debates 571.

[Footnote 23]

See note 14 *supra*.

[Footnote 24]

But see the instructions given to the jury by Mr. Justice Stable in *Regina v. Martin Secker Warburg*, [1954] 2 All Eng. 683 (C.C.C.).

[Footnote 25]

United States v. Kennerley, 209 F. 119; *MacFadden v. United States*, 165 F. 51; *United States v. Bennett*, 24 Fed.Cas. 1093; *United States v. Clarke*, 38 F. 500; *Commonwealth v. Buckley*, 200 Mass. 346, 86 N.E. 910.

[Footnote 26]

E.g., *Walker v. Popenoe*, 80 U.S.App.D.C. 129, 149 F.2d 511; *Parmelee v. United States*, 72 App.D.C. 203, 113 F.2d 729; *United States v. Levine*, 83 F.2d 156; *United States v. Dennett*, 39 F.2d 564; *Khan v. Feist, Inc.*, 70 F. Supp. 450, *aff'd*, 165 F.2d 188; *United States v. One Book Called "Fanny Hill"*, 188 F. Supp. 480, *aff'd*, 408 F.2d 1001, 40 American Civil Liberties Union v. American Booksellers Ass'n, Inc., 408 F.2d 1001, 40 American Civil Liberties Union v. American Booksellers Ass'n, Inc., 408 F.2d 1001.

States v. One Book Called Ulysses, 5 F. Supp. 182, *aff'd*, 72 F.2d 705; *American Civil Liberties Union v. Chicago*, 3 Ill. 2d 334, 121 N.E.2d 585; *Commonwealth v. Isenstadt*, 318 Mass. 543, 62 N.E.2d 840; *Missouri v. Becker*, 364 Mo. 1079, 272 S.W.2d 283; *Adams Theatre Co. v. Keenan*, 12 N.J. 267, 96 A.2d 519; *Bantam Books, Inc. v. Melko*, 25 N.J.Super. 292, 96 A.2d 47; *Commonwealth v. Gordon*, 66 Pa. D. & C. 101, *aff'd sub nom. Commonwealth v. Feigenbaum*, 166 Pa.Super. 120, 70 A.2d 389; *cf. Roth v. Goldman*, 172 F.2d 788, 794-795 (concurrence).

[Footnote 27]

In *Alberts*, the contention that the trial judge did not read the materials in their entirety is not before us because not fairly comprised within the questions presented.
U.S.Sup.Ct.Rules, 15(1)(c)(1).

[Footnote 28]

This Court, as early as 1896, said of the federal obscenity statute:

"... Every one who uses the mails of the United States for carrying papers or publications must take notice of what, in this enlightened age, is meant by decency, purity, and chastity in social life, and what must be deemed obscene, lewd, and lascivious."

Rosen v. United States, 161 U. S. 29, 161 U. S. 42.

[Footnote 29]

E.g., Roth v. Goldman, 172 F.2d 788, 789; *Parmelee v. United States*, 72 App.D.C. 203, 204, 113 F.2d 729, 730; *United States v. 4200 Copies International Journal*, 134 F. Supp. 490, 493; *United States v. One Unbound Volume*, 128 F. Supp. 280, 281.

[Footnote 30]

It is argued that, because juries may reach different conclusions as to the same material, the statutes must be held to be insufficiently precise to satisfy due process requirements. But it is common experience that different juries may reach different results under any criminal statute. That is one of the consequences we accept under our jury system. *Cf. Dunlop v. United States*, 165 U. S. 486, 165 U. S. 499-500.

[Footnote 31]

For the same reason, we reject, in this case, the argument that there is greater latitude for state action under the word "liberty" under the Fourteenth Amendment than is allowed to

Congress by the language of the First Amendment.

[Footnote 32]

In *Public Clearing House v. Coyne*, 194 U. S. 497, 194 U. S. 506-508, this Court said:

"The constitutional principles underlying the administration of the Post Office Department were discussed in the opinion of the court in *Ex parte Jackson*, 96 U. S. 727, in which we held that the power vested in Congress to establish post offices and post roads embraced the regulation of the entire postal system of the country; that Congress might designate what might be carried in the mails and what excluded. . . . It may . . . refuse to include in its mails such printed matter or merchandise as may seem objectionable to it upon the ground of public policy. . . . For more than thirty years, not only has the transmission of obscene matter been prohibited, but it has been made a crime, punishable by fine or imprisonment, for a person to deposit such matter in the mails. The constitutionality of this law we believe has never been attacked. . . ."

MR. CHIEF JUSTICE WARREN, concurring in the result.

I agree with the result reached by the Court in these cases, but, because we are operating in a field of expression and because broad language used here may eventually be applied to the arts and sciences and freedom of communication generally, I would limit our decision to the facts before us and to the validity of the statutes in question as applied.

Appellant Alberts was charged with willfully, unlawfully and lewdly disseminating obscene matter. Obscenity has been construed by the California courts to mean having a substantial tendency to corrupt by arousing lustful desires. *People v. Wepplo*, 78 Cal. App. 2d Supp. 959, 178 P.2d 853. Petitioner Roth was indicted for unlawfully, willfully and knowingly mailing obscene material that was calculated to corrupt and debauch the minds and morals of those to whom it was sent. Each was accorded all the protections of a criminal trial. Among other things, they contend that the statutes under which they were convicted violate the constitutional guarantees of freedom of speech, press and communication.

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That there is a social problem presented by obscenity is attested by the expression of the legislatures of the forty-eight States, as well as the Congress. To recognize the existence of a problem, however, does not require that we sustain any and all measures adopted to meet that problem. The history of the application of laws designed to suppress the obscene demonstrates convincingly that the power of government can be invoked under them against great art or literature, scientific treatises, or works exciting social controversy.

against great art or literature, scientific treatises, or works exciting social controversy.

Mistakes of the past prove that there is a strong countervailing interest to be considered in the freedoms guaranteed by the First and Fourteenth Amendments.

The line dividing the salacious or pornographic from literature or science is not straight and unwavering. Present laws depend largely upon the effect that the materials may have upon those who receive them. It is manifest that the same object may have a different impact, varying according to the part of the community it reached. But there is more to these cases. It is not the book that is on trial; it is a person. The conduct of the defendant is the central issue, not the obscenity of a book or picture. The nature of the materials is, of course, relevant as an attribute of the defendant's conduct, but the materials are thus placed in context from which they draw color and character. A wholly different result might be reached in a different setting.

The personal element in these cases is seen most strongly in the requirement of *scienter*. Under the California law, the prohibited activity must be done "willfully and lewdly." The federal statute limits the crime to acts done "knowingly." In his charge to the jury, the district judge stated that the matter must be "calculated" to corrupt or debauch. The defendants in both these cases were engaged in the business of purveying textual or

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graphic matter openly advertised to appeal to the erotic interest of their customers. They were plainly engaged in the commercial exploitation of the morbid and shameful craving for materials with prurient effect. I believe that the State and Federal Governments can constitutionally punish such conduct. That is all that these cases present to us, and that is all we need to decide.

I agree with the Court's decision in its rejection of the other contentions raised by these defendants.

MR. JUSTICE HARLAN, concurring in the result in No. 61, and dissenting in No. 582.

I regret not to be able to join the Court's opinion. I cannot do so, because I find lurking beneath its disarming generalizations a number of problems which not only leave me with serious misgivings as to the future effect of today's decisions, but which also, in my view, call for different results in these two cases.

I

My basic difficulties with the Court's opinion are threefold. First, the opinion paints with such a broad brush that I fear it may result in a loosening of the tight reins which state and

such a broad basis that I fear it may result in a weakening of the legal basis upon which state and federal courts should hold upon the enforcement of obscenity statutes. Second, the Court fails to discriminate between the different factors which, in my opinion, are involved in the constitutional adjudication of state and federal obscenity cases. Third, relevant distinctions between the two obscenity statutes here involved, and the Court's own definition of "obscenity," are ignored.

In final analysis, the problem presented by these cases is how far, and on what terms, the state and federal governments have power to punish individuals for disseminating books considered to be undesirable because of their

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nature or supposed deleterious effect upon human conduct. Proceeding from the premise that "no issue is presented in either case, concerning the obscenity of the material involved," the Court finds the "dispositive question" to be "whether obscenity is utterance within the area of protected speech and press," and then holds that "obscenity" is not so protected, because it is "utterly without redeeming social importance." This sweeping formula appears to me to beg the very question before us. The Court seems to assume that "obscenity" is a peculiar *genus* of "speech and press," which is as distinct, recognizable, and classifiable as poison ivy is among other plants. On this basis, the *constitutional* question before us simply becomes, as the Court says, whether "obscenity," as an abstraction, is protected by the First and Fourteenth Amendments, and the question whether a *particular* book may be suppressed becomes a mere matter of classification, of "fact," to be entrusted to a factfinder and insulated from independent constitutional judgment. But surely the problem cannot be solved in such a generalized fashion. Every communication has an individuality and "value" of its own. The suppression of a particular writing or other tangible form of expression is, therefore, an *individual* matter, and in the nature of things every such suppression raises an individual constitutional problem, in which a reviewing court must determine for *itself* whether the attacked expression is suppressable within constitutional standards. Since those standards do not readily lend themselves to generalized definitions, the constitutional problem, in the last analysis, becomes one of particularized judgments which appellate courts must make for themselves.

I do not think that reviewing courts can escape this responsibility by saying that the trier of the facts, be it a jury or a judge, has labeled the questioned matter as "obscene," for, if "obscenity" is to be suppressed, the

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question whether a particular work is of that character involves not really an issue of fact, but a question of constitutional *judgment* of the most sensitive and delicate kind. Many juries might find that Joyce's "Ulysses" or Bocaccio's "Decameron" was obscene, and yet the conviction of a defendant for selling either book would raise, for me, the gravest constitutional problems, for no such verdict could convince me, without more, that these books are "utterly without redeeming social importance." In short, I do not understand how the Court can resolve the constitutional problems now before it without making its own independent judgment upon the character of the material upon which these convictions were based. I am very much afraid that the broad manner in which the Court has decided these cases will tend to obscure the peculiar responsibilities resting on state and federal courts in this field, and encourage them to rely on easy labeling and jury verdicts as a substitute for facing up to the tough individual problems of constitutional judgment involved in every obscenity case.

My second reason for dissatisfaction with the Court's opinion is that the broad strides with which the Court has proceeded has led it to brush aside with perfunctory ease the vital constitutional considerations which, in my opinion, differentiate these two cases. It does not seem to matter to the Court that, in one case, we balance the power of a State in this field against the restrictions of the Fourteenth Amendment, and, in the other, the power of the Federal Government against the limitations of the First Amendment. I deal with this subject more particularly later.

Thirdly, the Court has not been bothered by the fact that the two cases involve different statutes. In California, the book must have a "tendency to deprave or corrupt its readers"; under the federal statute, it must tend "to stir sexual impulses and lead to sexually impure

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thoughts." [Footnote 2/1] The two statutes do not seem to me to present the same problems. Yet the Court compounds confusion when it superimposes on these two statutory definitions a third, drawn from the American Law Institute's Model Penal Code, Tentative Draft No. 6: "A thing is obscene if, considered as a whole, its predominant appeal is to prurient interest." The bland assurance that this definition is the same as the ones with which we deal flies in the face of the authors' express rejection of the "deprave and corrupt" and "sexual thoughts" tests:

"Obscenity [in the Tentative Draft] is defined in terms of material which appeals predominantly to prurient interest in sexual matters and which goes beyond customary freedom of expression in these matters. We reject the prevailing test of tendency to arouse lustful thoughts or desires because it is

unrealistically broad for a society that plainly tolerates a great deal of erotic interest in literature, advertising, and art, and because regulation of thought or desire, unconnected with overt misbehavior, raises the most acute constitutional as well as practical difficulties. We likewise reject the common definition of obscene as that which 'tends to corrupt or debase.' If this means anything different from tendency to arouse lustful thought and desire, it suggests that change of character or actual misbehavior follows from contact with obscenity. Evidence of such consequences is lacking. . . . On the other hand, 'appeal to prurient interest' refers to qualities of the material itself: the capacity to attract individuals eager for a forbidden look. . . . [Footnote 2/2]"

As this passage makes clear, there is a significant distinction between the definitions used in the prosecutions before us and the American Law Institute formula. If, therefore, the latter is the correct standard, as my Brother BRENNAN elsewhere intimates, [Footnote 2/3] then these convictions should surely be reversed. Instead, the Court merely assimilates the various tests into one indiscriminate potpourri.

I now pass to the consideration of the two cases before us.

II

I concur in the judgment of the Court in No. 61, *Alberts v. California*.

The question in this case is whether the defendant was deprived of liberty without due process of law when he was convicted for selling certain materials found by the judge to be obscene because they would have a "tendency

to deprave or corrupt its readers by exciting lascivious thoughts or arousing lustful desire."

In judging the constitutionality of this conviction, we should remember that our function in reviewing state judgments under the Fourteenth Amendment is a narrow one. We do not decide whether the policy of the State is wise, or whether it is based on assumptions scientifically substantiated. We can inquire only whether the state action so subverts the fundamental liberties implicit in the Due Process Clause that it cannot be sustained as a rational exercise of power. *See* Jackson, J., dissenting in *Beauharnais v. Illinois*, 343 U. S. 250, 343 U. S. 287. The States' power to make printed words criminal is, of course, confined by the Fourteenth Amendment, but only insofar as such power is inconsistent with our

concepts of "ordered liberty." *Palko v. Connecticut*, 302 U. S. 319, 302 U. S. 324-325.

What, then, is the purpose of this California statute? Clearly the state legislature has made the judgment that printed words can "deprave or corrupt" the reader -- that words can incite to antisocial or immoral action. The assumption seems to be that the distribution of certain types of literature will induce criminal or immoral sexual conduct. It is well known, of course, that the validity of this assumption is a matter of dispute among critics, sociologists, psychiatrists, and penologists. There is a large school of thought, particularly in the scientific community, which denies any causal connection between the reading of pornography and immorality, crime, or delinquency. Others disagree. Clearly it is not our function to decide this question. That function belongs to the state legislature. Nothing in the Constitution requires California to accept as truth the most advanced and sophisticated psychiatric opinion. It seems to me clear that it is not irrational, in our present state of knowledge, to consider that pornography can induce a type of sexual conduct which a State may deem obnoxious to the

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moral fabric of society. In fact, the very division of opinion on the subject counsels us to respect the choice made by the State.

Furthermore, even assuming that pornography cannot be deemed ever to cause, in an immediate sense, criminal sexual conduct, other interests within the proper cognizance of the States may be protected by the prohibition placed on such materials. The State can reasonably draw the inference that, over a long period of time, the indiscriminate dissemination of materials the essential character of which is to degrade sex will have an eroding effect on moral standards. And the State has a legitimate interest in protecting the privacy of the home against invasion of unsolicited obscenity.

Above all stands the realization that we deal here with an area where knowledge is small, data are insufficient, and experts are divided. Since the domain of sexual morality is preeminently a matter of state concern, this Court should be slow to interfere with state legislation calculated to protect that morality. It seems to me that nothing in the broad and flexible command of the Due Process Clause forbids California to prosecute one who sells books whose dominant tendency might be to "deprave or corrupt" a reader. I agree with the Court, of course, that the books must be judged as a whole, and in relation to the normal adult reader.

What has been said, however, does not dispose of the case. It still remains for us to decide whether the state court's determination that this material should be suppressed is

consistent with the Fourteenth Amendment, and that, of course, presents a federal question as to which we, and not the state court, have the ultimate responsibility. And so, in the final analysis, I concur in the judgment because, upon an independent perusal of the material involved, and in light of the considerations discussed

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above, I cannot say that its suppression would so interfere with the communication of "ideas" in any proper sense of that term that it would offend the Due Process Clause. I therefore agree with the Court that appellant's conviction must be affirmed.

III

I dissent in No. 582, *Roth v. United States*.

We are faced here with the question whether the federal obscenity statute, as construed and applied in this case, violates the First Amendment to the Constitution. To me, this question is of quite a different order than one where we are dealing with state legislation under the Fourteenth Amendment. I do not think it follows that state and federal powers in this area are the same, and that, just because the State may suppress a particular utterance, it is automatically permissible for the Federal Government to do the same. I agree with Mr. Justice Jackson that the historical evidence does not bear out the claim that the Fourteenth Amendment "incorporates" the First in any literal sense. *See Beauharnais v. Illinois, supra*. But laying aside any consequences which might flow from that conclusion, *cf.* Mr. Justice Holmes in *Gitlow v. New York*, 268 U. S. 652, 268 U. S. 672, [Footnote 2/4] I prefer to rest my views about this case on broader and less abstract grounds.

The Constitution differentiates between those areas of human conduct subject to the regulation of the States and those subject to the powers of the Federal Government. The substantive powers of the two governments, in many

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instances, are distinct. And in every case where we are called upon to balance the interest in free expression against other interests, it seems to me important that we should keep in the forefront the question of whether those other interests are state or federal. Since, under our constitutional scheme, the two are not necessarily equivalent, the balancing process must needs often produce different results. Whether a particular limitation on speech or press is to be upheld because it subserves a paramount governmental interest must, to a large extent, I think, depend on whether that government has, under the Constitution, a direct substantive interest that is the power to act in the particular area involved

substantive interest, that is, the power to act, in the particular area involved.

The Federal Government has, for example, power to restrict seditious speech directed against it, because that Government certainly has the substantive authority to protect itself against revolution. *Cf. Pennsylvania v. Nelson*, 350 U. S. 497. But, in dealing with obscenity, we are faced with the converse situation, for the interests which obscenity statutes purportedly protect are primarily entrusted to the care not of the Federal Government, but of the States. Congress has no substantive power over sexual morality. Such powers as the Federal Government has in this field are but incidental to its other powers, here, the postal power, and are not of the same nature as those possessed by the States, which bear direct responsibility for the protection of the local moral fabric. [Footnote 2/5]

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What Mr. Justice Jackson said in *Beauharnais*, *supra*, 343 U.S. at 343 U. S. 294-295, about criminal libel is equally true of obscenity:

"The inappropriateness of a single standard for restricting State and Nation is indicated by the disparity between their functions and duties in relation to those freedoms. Criminality of defamation is predicated upon power either to protect the private right to enjoy integrity of reputation or the public right to tranquillity. Neither of these are objects of federal cognizance except when necessary to the accomplishment of some delegated power. . . . When the Federal Government puts liberty of press in one scale, it has a very limited duty to personal reputation or local tranquillity to weigh against it in the other. But state action affecting speech or press can and should be weighed against and reconciled with these conflicting social interests."

Not only is the federal interest in protecting the Nation against pornography attenuated, but the dangers of federal censorship in this field are far greater than anything the States may do. It has often been said that one of the great strengths of our federal system is that we have, in the forty-eight States, forty-eight experimental social laboratories.

"State statutory law reflects predominantly this capacity of a legislature to introduce novel techniques of social control. The federal system has the immense advantage of providing forty-eight separate centers for such experimentation. [Footnote 2/6]"

Different States will have different attitudes toward the same work of literature. The same book which is freely read in one State might be

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classed as obscene in another. [Footnote 2/7] And it seems to me that no overwhelming danger to our freedom to experiment and to gratify our tastes in literature is likely to result from the suppression of a borderline book in one of the States so long as there is no uniform nationwide suppression of the book, and so long as other States are free to experiment with the same or bolder books.

Quite a different situation is presented, however, where the Federal Government imposes the ban. The danger is perhaps not great if the people of one State, through their legislature, decide that "Lady Chatterley's Lover" goes so far beyond the acceptable standards of candor that it will be deemed offensive and non-sellable, for the State next door is still free to make its own choice. At least we do not have one uniform standard. But the dangers to free thought and expression are truly great if the Federal Government imposes a blanket ban over the Nation on such a book. The prerogative of the States to differ on their ideas of morality will be destroyed, the ability of States to experiment will be stunted. The fact that the people of one State cannot read some of the works of D. H. Lawrence seems to me, if not wise or desirable, at least acceptable. But that no person in the United States should be allowed to do so seems to me to be intolerable, and violative of both the letter and spirit of the First Amendment.

I judge this case, then, in view of what I think is the attenuated federal interest in this field, in view of the very real danger of a deadening uniformity which can result from nationwide federal censorship, and in view of the

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fact that the constitutionality of this conviction must be weighed against the First, and not the Fourteenth, Amendment. So viewed, I do not think that this conviction can be upheld. The petitioner was convicted under a statute which, under the judge's charge, [Footnote 2/8] makes it criminal to sell books which "tend to stir sexual impulses and lead to sexually impure thoughts." I cannot agree that any book which tends to stir sexual impulses and lead to sexually impure thoughts necessarily is "utterly without redeeming social importance." Not only did this charge fail to measure up to the standards which I understand the Court to approve, but, as far as I can see, much of the great literature of the world could lead to conviction under such a view of the statute. Moreover, in no event do I think that the limited federal interest in this area can extend to mere "thoughts." The Federal Government has no business, whether under the postal or commerce power, to bar the sale of books because they might lead to any kind of "thoughts." [Footnote 2/9]

It is no answer to say, as the Court does, that obscenity is not protected speech. The point is that this statute, as here construed, defines obscenity so widely that it encompasses

matters which might very well be protected speech. I do not think that the federal statute can be constitutionally construed to reach other than what the Government has termed as "hard-core" pornography. Nor do I think the statute can fairly be read as directed

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only at *persons* who are engaged in the business of catering to the prurient minded, even though their wares fall short of hard-core pornography. Such a statute would raise constitutional questions of a different order. That being so, and since, in my opinion, the material here involved cannot be said to be hard-core pornography, I would reverse this case with instructions to dismiss the indictment.

[Footnote 2/1]

In *Alberts v. California*, the state definition of "obscenity" is, of course, binding on us. The definition there used derives from *People v. Wepplo*, 78 Cal. App. 2d Supp. 959, 178 P.2d 853, the question being whether the material has "a substantive tendency to deprave or corrupt its readers by exciting lascivious thoughts or arousing lustful desire."

In *Roth v. United States*, our grant of certiorari was limited to the question of the constitutionality of the statute, and did not encompass the correctness of the definition of "obscenity" adopted by the trial judge as a matter of statutory construction. We must therefore assume that the trial judge correctly defined that term, and deal with the constitutionality of the statute as construed and applied in this case.

The two definitions do not seem to me synonymous. Under the federal definition, it is enough if the jury finds that the book as a whole leads to certain thoughts. In California, the further inference must be drawn that such thoughts will have a substantive "tendency to deprave or corrupt" -- *i.e.*, that the thoughts induced by the material will affect character and action. *See* American Law Institute, Model Penal Code, Tentative Draft No. 6, § 207.10(2), Comments, p. 10.

[Footnote 2/2]

Ibid.

[Footnote 2/3]

See dissenting opinion of MR. JUSTICE BRENNAN in *Kingsley Books, Inc. v. Brown*, No. 107, *ante*, p. 354 U. S. 447.

[Footnote 2/4]

"The general principle of free speech, it seems to me, must be taken to be included in the Fourteenth Amendment, in view of the scope that has been given to the word 'liberty' as there used, although perhaps it may be accepted with a somewhat larger latitude of interpretation than is allowed to Congress by the sweeping language that governs or ought to govern the laws of the United States."

[Footnote 2/5]

The hoary dogma of *Ex parte Jackson*, 96 U. S. 727, and *Public Clearing House v. Coyne*, 194 U. S. 497, that the use of the mails is a privilege on which the Government may impose such conditions as it chooses, has long since evaporated. See Brandeis, J., dissenting, in *Milwaukee Social Democratic Publishing Co. v. Burleson*, 255 U. S. 407, 255 U. S. 430-433; Holmes, J., dissenting, in *Leach v. Carlile*, 258 U. S. 138, 258 U. S. 140; *Cates v. Haderline*, 342 U.S. 804, reversing 189 F.2d 369; *Door v. Donaldson*, 90 U.S.App.D.C. 188, 195 F.2d 764.

[Footnote 2/6]

Hart, *The Relations Between State and Federal Law*, 54 Col.L.Rev. 489, 493.

[Footnote 2/7]

To give only a few examples: Edmund Wilson's "Memoirs of Hecate County" was found obscene in New York, see *Doubleday & Co. v. New York*, 335 U.S. 848; a bookseller indicted for selling the same book was acquitted in California. "God's Little Acre" was held to be obscene in Massachusetts, not obscene in New York and Pennsylvania.

[Footnote 2/8]

While the correctness of the judge's charge is not before us, the question is necessarily subsumed in the broader question involving the constitutionality of the statute as applied in this case.

[Footnote 2/9]

See American Law Institute, *Model Penal Code*, Tentative Draft No. 6, § 207.10, Comments, p. 20:

"As an independent goal of penal legislation, repression of sexual thoughts and desires is hard to support. Thoughts and desires not manifested in overt antisocial behavior are

generally regarded as the exclusive concern of the individual and his spiritual advisors."

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BLACK concurs, dissenting.

When we sustain these convictions, we make the legality of a publication turn on the purity of thought which a book or tract instills in the mind of the reader. I do not think we can approve that standard and be faithful to the command of the First Amendment, which, by its terms, is a restraint on Congress and which by the Fourteenth is a restraint on the States.

In the *Roth* case, the trial judge charged the jury that the statutory words "obscene, lewd and lascivious" describe "that form of immorality which has relation to sexual impurity and has a tendency to excite lustful thoughts." He stated that the term "filthy" in the statute pertains "to that sort of treatment of sexual matters in such a vulgar and indecent way, so that it tends to arouse a feeling of disgust and revulsion." He went on to say that the material "must be calculated to corrupt and debauch the minds and morals" of "the average person in the community," not those of any particular class.

"You judge the circulars, pictures and publications which have been put in evidence by present-day standards of the community. You may ask yourselves does it offend the common conscience of the community by present-day standards."

The trial judge who, sitting without a jury, heard the *Alberts* case, and the appellate court that sustained the

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judgment of conviction, took California's definition of "obscenity" from *People v. Wepplo*, 78 Cal. App. 2d Supp. 959, 961, 178 P.2d 853, 855. That case held that a book is obscene "if it has a substantial tendency to deprave or corrupt its readers by inciting lascivious thoughts or arousing lustful desire."

By these standards, punishment is inflicted for thoughts provoked, not for overt acts nor antisocial conduct. This test cannot be squared with our decisions under the First Amendment. Even the ill-starred *Dennis* case conceded that speech, to be punishable, must have some relation to action which could be penalized by government. *Dennis v. United States*, 341 U. S. 494, 341 U. S. 502-511. Cf. Chafee, *The Blessings of Liberty* (1956), p. 69. This issue cannot be avoided by saying that obscenity is not protected by the First Amendment. The question remains, what is the constitutional test of obscenity?

The tests by which these convictions were obtained require only the arousing of sexual

THE TESTS BY WHICH THESE CONVICTIONS WERE OBTAINED REQUIRE ONLY THE AROUSING OF SEXUAL thoughts. Yet the arousing of sexual thoughts and desires happens every day in normal life in dozens of ways. Nearly 30 years ago, a questionnaire sent to college and normal school women graduates asked what things were most stimulating sexually. Of 409 replies, 9 said "music"; 18 said "pictures"; 29 said "dancing"; 40 said "drama"; 95 said "books", and 218 said "man." Alpert, Judicial Censorship of Obscene Literature, 52 Harv.L.Rev. 40, 73.

The test of obscenity the Court endorses today gives the censor free range over a vast domain. To allow the State to step in and punish mere speech or publication that the judge or the jury thinks has an undesirable impact on thoughts, but that is not shown to be a part of unlawful action, is drastically to curtail the First Amendment. As recently stated by two of our outstanding authorities on obscenity,

"The danger of influencing a change in the current moral standards of the community, or of shocking

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or offending readers, or of stimulating sex thoughts or desires apart from objective conduct, can never justify the losses to society that result from interference with literary freedom."

Lockhart & McClure, Literature, The Law of Obscenity, and the Constitution, 38 Minn.L.Rev. 295, 387.

If we were certain that impurity of sexual thoughts impelled to action, we would be on less dangerous ground in punishing the distributors of this sex literature. But it is by no means clear that obscene literature, as so defined, is a significant factor in influencing substantial deviations from the community standards.

"There are a number of reasons for real and substantial doubts as to the soundness of that hypothesis. (1) Scientific studies of juvenile delinquency demonstrate that those who get into trouble, and are the greatest concern of the advocates of censorship, are far less inclined to read than those who do not become delinquent. The delinquents are generally the adventurous type, who have little use for reading and other non-active entertainment. Thus, even assuming that reading sometimes has an adverse effect upon moral conduct, the effect is not likely to be substantial, for those who are susceptible seldom read. (2) Sheldon and Eleanor Glueck, who are among the country's leading authorities on the treatment and causes of juvenile delinquency, have recently published the results of a ten-year study of its causes. They exhaustively studied approximately 90 factors and influences that might lead to or explain juvenile delinquency, but the Gluecks gave no consideration to the type of reading material, if any, read by the delinquents. This is, of course, consistent with their

reading material, if any, read by the delinquents. This is, of course, consistent with their finding that delinquents read very little. When those who know so much about the problem of delinquency among youth -- the very

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group about whom the advocates of censorship are most concerned -- conclude that what delinquents read has so little effect upon their conduct that it is not worth investigating in an exhaustive study of causes, there is good reason for serious doubt concerning the basic hypothesis on which obscenity censorship is defended. (3) The many other influences in society that stimulate sexual desire are so much more frequent in their influence, and so much more potent in their effect, that the influence of reading is likely, at most, to be relatively insignificant in the composite of forces that lead an individual into conduct deviating from the community sex standards. The Kinsey studies show the minor degree to which literature serves as a potent sexual stimulant. And the studies demonstrating that sex knowledge seldom results from reading indicates [*sic*] the relative unimportance of literature in sex thoughts, as compared with other factors in society."

Lockhart & McClure, *op. cit. supra*, pp. 385-386.

The absence of dependable information on the effect of obscene literature on human conduct should make us wary. It should put us on the side of protecting society's interest in literature, except and unless it can be said that the particular publication has an impact on action that the government can control.

As noted, the trial judge in the *Roth* case charged the jury in the alternative that the federal obscenity statute outlaws literature dealing with sex which offends "the common conscience of the community." That standard is, in my view, more inimical still to freedom of expression.

The standard of what offends "the common conscience of the community" conflicts, in my judgment, with the command of the First Amendment that "Congress shall make no law . . . abridging the freedom of speech, or

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of the press." Certainly that standard would not be an acceptable one if religion, economics, politics or philosophy were involved. How does it become a constitutional standard when literature treating with sex is concerned?

Any test that turns on what is offensive to the community's standards is too loose, too

capricious, too destructive of freedom of expression to be squared with the First Amendment. Under that test, juries can censor, suppress, and punish what they don't like, provided the matter relates to "sexual impurity" or has a tendency "to excite lustful thoughts." This is community censorship in one of its worst forms. It creates a regime where, in the battle between the literati and the Philistines, the Philistines are certain to win. If experience in this field teaches anything, it is that "censorship of obscenity has almost always been both irrational and indiscriminate." Lockhart & McClure, *op. cit. supra* at 371. The test adopted here accentuates that trend.

I assume there is nothing in the Constitution which forbids Congress from using its power over the mails to proscribe *conduct* on the grounds of good morals. No one would suggest that the First Amendment permits nudity in public places, adultery, and other phases of sexual misconduct.

I can understand (and at times even sympathize) with programs of civic groups and church groups to protect and defend the existing moral standards of the community. I can understand the motives of the Anthony Comstocks who would impose Victorian standards on the community. When speech alone is involved, I do not think that government, consistently with the First Amendment, can become the sponsor of any of these movements. I do not think that government, consistently with the First Amendment, can throw its weight behind one school or another. Government should be

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concerned with anti-social conduct, not with utterances. Thus, if the First Amendment guarantee of freedom of speech and press is to mean anything in this field, it must allow protests even against the moral code that the standard of the day sets for the community. In other words, literature should not be suppressed merely because it offends the moral code of the censor.

The legality of a publication in this country should never be allowed to turn either on the purity of thought which it instills in the mind of the reader or on the degree to which it offends the community conscience. By either test, the role of the censor is exalted, and society's values in literary freedom are sacrificed.

The Court today suggests a third standard. It defines obscene material as that "which deals with sex in a manner appealing to prurient interest."* Like the standards applied by the trial judges below, that standard does not require any nexus between the literature which is prohibited and action which the legislature can regulate or prohibit. Under the First Amendment, that standard is no more valid than those which the courts below adopted.

I do not think that the problem can be resolved by the Court's statement that "obscenity is not expression protected

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by the First Amendment." With the exception of *Beauharnais v. Illinois*, 343 U. S. 250, none of our cases has resolved problems of free speech and free press by placing any form of expression beyond the pale of the absolute prohibition of the First Amendment. Unlike the law of libel, wrongfully relied on in *Beauharnais*, there is no special historical evidence that literature dealing with sex was intended to be treated in a special manner by those who drafted the First Amendment. In fact, the first reported court decision in this country involving obscene literature was in 1821. Lockhart & McClure, *op. cit. supra* at 324, n. 200. I reject too the implication that problems of freedom of speech and of the press are to be resolved by weighing against the values of free expression the judgment of the Court that a particular form of that expression has "no redeeming social importance." The First Amendment, its prohibition in terms absolute, was designed to preclude courts as well as legislatures from weighing the values of speech against silence. The First Amendment puts free speech in the preferred position.

Freedom of expression can be suppressed if, and to the extent that, it is so closely brigaded with illegal action as to be an inseparable part of it. *Giboney v. Empire Storage Co.*, 336 U. S. 490, 336 U. S. 498; *Labor Board v. Virginia Power Co.*, 314 U. S. 469, 314 U. S. 477-478. As a people, we cannot afford to relax that standard. For the test that suppresses a cheap tract today can suppress a literary gem tomorrow. All it need do is to incite a lascivious thought or arouse a lustful desire. The list of books that judges or juries can place in that category is endless.

I would give the broad sweep of the First Amendment full support. I have the same confidence in the ability of our people to reject noxious literature as I have in their capacity to sort out the true from the false in theology, economics, politics, or any other field.

* The definition of obscenity which the Court adopts seems in substance to be that adopted by those who drafted the A.L.I., Model Penal Code. § 207.10(2) (Tentative Draft No. 6, 1957).

"Obscenity is defined in terms of material which appeals predominantly to prurient interest in sexual matters and which goes beyond customary freedom of expression in these matters. We reject the prevailing tests of tendency to arouse lustful thoughts or desires because it is unrealistically broad for a society that plainly tolerates a great deal of erotic

interest in literature, advertising, and art, and because regulation of thought or desire, unconnected with overt misbehavior, raises the most acute constitutional, as well as practical, difficulties."

Id. at 10.

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US v Roth
Appeal

237 F.2d 796

1957

JUSTIA

United States of America, Appellee, v. Samuel Roth, Appellant, 237 F.2d 796 (2d Cir. 1957)

US Court of Appeals for the Second Circuit - 237 F.2d 796 (2d Cir. 1957)

Argued June 6, 1956

Decided September 18, 1956

Writ of Certiorari Granted January 14, 1957

See 77 S. Ct. 361.

Philip Wittenberg, New York City (Wittenberg, Carrington & Farnsworth and Irving Like, New York City, on the brief), for appellant.

George S. Leisure, Jr., Asst. U. S. Atty., S. D. N. Y., New York City (Paul W. Williams, U. S. Atty., New York City, on the brief), for appellee.

Before CLARK, Chief Judge, and FRANK and WATERMAN, Circuit Judges.

CLARK, Chief Judge.

This is an appeal by Samuel Roth from his conviction for violation of 18 U.S.C. § 1461. The indictment contained twenty-six counts charging the mailing of books, periodicals, and photographs (and circulars advertising some of them) alleged to be "obscene, lewd, lascivious, filthy and of an indecent character." Three counts were dismissed. After a trial the jury found defendant guilty on four counts, and not guilty on nineteen. The trial judge

sentenced defendant to five years' imprisonment and to pay a fine of \$5,000 on one count, while on each of the other three counts he gave a like term of imprisonment, to run concurrently, and a \$1 fine remitted in each case. On this appeal, defendant claims error in the conduct of the trial, but once again attacks the constitutionality of the governing statute.

This statute, 18 U.S.C. § 1461, originally passed as § 148 of the act of June 8, 1872, 17 Stat. 302, revising, consolidating, and amending the statutes relating to the Post Office Department, and thence derived from Rev.Stat. § 3893, herein declares unmailable "[e]very obscene, lewd, lascivious, or filthy book, pamphlet, picture, paper, letter, writing, print, or other publication of an indecent character,"¹ and makes the knowing deposit for mailing of such unmailable matter subject to a fine of not more than \$5,000 or imprisonment of not more than five years, or both. In *United States v. Rebhuhn*, 2 Cir., 109 F.2d 512, 514, certiorari denied *Rebhuhn v. United States*, 310 U.S. 629, 60 S. Ct. 976, 84 L. Ed. 1399, Judge Learned Hand, in dealing with a claim of unconstitutionality, pointed out that it had been overruled in *Rosen v. United States*, 161 U.S. 29, 16 S. Ct. 434, 480, 40 L. Ed. 606, "and many indictments have since been found, and many persons tried and convicted. * * * If the question is to be reopened the Supreme Court must open it." Since that decision many more cases have acknowledged the constitutionality of the statute, so much so that we feel it is not the part of responsible judicial administration for an inferior court such as ours, whatever our personal opinions, to initiate a new and uncharted course of overturn of a statute thus long regarded of vital social importance and a public policy of wide general support. It is easy, in matters touching the arts, to condescend to the poor troubled enforcement officials; but so to do will not carry us measurably nearer a permanent and generally acceptable solution of a continuing social problem.

Against this background we are impressed by the decision this year of a great court in *Brown v. Kingsley Books, Inc.*, 1 N.Y.2d 177, 151 N.Y.S.2d 639, 641, 642, 134 N.E.2d 461, 463, where, accepting general constitutionality of such legislation, the decision breaks new ground in upholding authorization of preventive relief by way of injunction at the suit of a public officer.² In his opinion, Judge Fuld summarizes the controlling law thus: "That clearly drawn regulatory legislation to protect the public from the evils inherent in the dissemination of obscene matter, at least by the application of criminal sanctions, is not barred by the free speech guarantees of the First Amendment, has been recognized both by this court [citing cases] and by the United States Supreme Court [citing cases]." Among cases from New York which he cites is *People v. Doubleday & Co.*, 297 N.Y. 687, 77 N.E.2d 6, affirmed by an equally divided court, 335 U.S. 848, 69 S. Ct. 79, 93 L. Ed. 398, while among the cases in the United States Supreme Court upon which he relies are *United States v. Alpers*, 338 U.S. 680, 70 S. Ct. 352, 94 L. Ed. 457; *Winters v. People of State of New*

York, 333 U.S. 507, 510, 518, 520, 68 S. Ct. 665, 92 L. Ed. 840; and *United States v. Limehouse*, 285 U.S. 424, 52 S. Ct. 412, 76 L. Ed. 843. He goes on to say: "Imprecise though it be — its 'vague subject-matter' being largely 'left to the gradual development of general notions about what is decent' (per L. Hand, J., *United States v. Kennerley*, D.C., 209 F. 119, 121) — the concept of obscenity has heretofore been accepted as an adequate standard." In the case last cited, Judge Hand asked [209 F. 121], "* * * should not the word 'obscene' be allowed to indicate the present critical point in the compromise between candor and shame at which the community may have arrived here and now?" and continued: "If letters must, like other kinds of conduct, be subject to the social sense of what is right, it would seem that a jury should in each case establish the standard much as they do in cases of negligence." In quoting this with approval, the Ninth Circuit has recently said: "We think Judge Learned Hand was in the best of his famous form in his happy use of words." *Besig v. United States*, 9 Cir., 208 F.2d 142, 147.

So this important social problem, which has come down to us from English law and which has led to statutes of a generally similar nature in almost all of the other jurisdictions in this country, see *Brown v. Kingsley Books, Inc.*, supra, 1 N.Y.2d 177, 151 N.Y.S.2d 639, 134 N.E.2d 461; Note, 22 U. of Chi.L.Rev. 216, has resulted in a general judicial unanimity in supporting such prosecutions. There is a considerable body of additional precedents beyond those cited above, both in the Supreme Court of the United States and in other federal jurisdictions, of which various examples are given in the footnote.³ It will not do to distinguish these cases as dicta or suggest that they have not considered modern problems. They are too many and too much of a piece to allow an intermediate court to make an inference of doubt in the circumstances. We can understand all the difficulties of censorship of great literature, and indeed the various foolish excesses involved in the banning of notable books, without feeling justified in casting doubt upon all criminal prosecutions, both state and federal, of commercialized obscenity. A serious problem does arise when real literature is censored; but in this case no such issues should arise, since the record shows only salable pornography. But even if we had more freedom to follow an impulse to strike down such legislation in the premises, we should need to pause because of our own lack of knowledge of the social bearing of this problem, or consequences of such an act;⁴ and we are hardly justified in rejecting out of hand the strongly held views of those with competence in the premises as to the very direct connection of this traffic with the development of juvenile delinquency.⁵ We conclude, therefore, that the attack on constitutionality of this statute must here fail.

Defendant, however, takes special exception to the judge's treatment in his charge of the word "filthy," asserting that he opposed this term to the other parts of the statute, so as to

render the statute vague and indefinite. What the judge said was this: "'Filthy' as used here must also relate to sexual matters. It is distinguishable from the term 'obscene,' which tends to promote lust and impure thoughts. 'Filthy' pertains to that sort of treatment of sexual matters in such a vulgar and indecent way, so that it tends to arouse a feeling of disgust and revulsion." But this seems to us in line with long-standing judicial definitions of the term. The words "and every filthy" were inserted in the statute at the time of the enactment of the Penal Code in 1909. And in *United States v. Limehouse*, supra, 285 U.S. 424, 426, 52 S. Ct. 412, in 1932, Mr. Justice Brandeis for the Court pointed out the obvious intent to add "a new class of unmailable matter — the filthy." As he definitely pointed out, this plainly covered sexual matters; and the Court, so he said, had no occasion to consider whether filthy matter of a different character also fell within the prohibition. We do not see how this case can be read other than as support for the interpretation made by the court below and for the validity of the Act as interpreted. Moreover, earlier it had been ruled by the Sixth Circuit in *Tyomies Pub. Co. v. United States*, 6 Cir., 211 F. 385, 390, in 1914, that the trial judge properly submitted the issue to the jury as to whether or not a picture was filthy with the explanation: "'By the term 'filthy' is meant what it commonly or ordinarily signifies; that which is nasty, dirty, vulgar, indecent, offensive to the moral sense, morally depraving and debasing.'" This is in substance what Judge Cashin charged here. See also *United States v. Davidson*, D.C.N.D.N.Y., 244 F. 523, 534, 535; *Sunshine Book Co. v. Summerfield*, D.C. D.C., 128 F. Supp. 564.

Hence, having in mind Judge Hand's admonition in *United States v. Kennerley*, supra, D.C.S.D.N.Y., 209 F. 119, 121, that the jury must finally apply the standard thus indicated, we think there was nothing objectionable in the judge's instructions to the jury. Certainly, against this background, "filthy" is as clear and as easily understandable by the jury⁶ as the terms "obscene" and "lewd" already committed to its care. Possibly some different nuances might have been given the term — though we are not sure what, nor are we given suggestions — but we cannot believe that the jury would have been helped. Nor did the defendant at the time find anything to question in the charge; his counsel, after the judge had granted all the specific additional requests he made, said that the judge had "fairly covered everything." Now he is not in a position to press this objection. Here we have more than a waiver by failure to object. We have in fact an instance of submission of issues to the jury on more than a single ground which might have been separated had the parties so desired. Since no request for separate verdicts or for withdrawal of this issue from the jury was made, the conviction must stand as supported by the clear evidence of obscenity. *United States v. Mascuch*, 2 Cir., 111 F.2d 602, certiorari denied *Mascuch v. United States*, 311 U.S. 650, 61 S. Ct. 14, 85 L. Ed. 416; *United States v. Smith*, 2 Cir., 112 F.2d 83, 86; *United States v. Goldstein*, 2 Cir., 168 F.2d 666, 672; *Claassen v. United States*, 142 U.S.

140, 147, 12 S. Ct. 169, 35 L. Ed. 966; *Stevens v. United States*, 6 Cir., 206 F.2d 64, 66; *Todorow v. United States*, 9 Cir., 173 F.2d 439, 445, certiorari denied 337 U.S. 925, 69 S. Ct. 1169, 93 L. Ed. 1733; *United States v. Myers*, D.C.N.D. Cal., 131 F. Supp. 525, 528. On either ground, therefore, this assignment of error must fail.

Our conclusion here settles the substantial issues on this appeal. As we have indicated, if the statute is to be upheld at all it must apply to a case of this kind where defendant is an old hand at publishing and surreptitiously mailing to those induced to order them such lurid pictures and material as he can find profitable. There was ample evidence for the jury, and the defendant had an unusual trial in that the judge allowed him to produce experts, including a psychologist who stated that he would find nothing obscene at the present time. Also various modern novels were submitted to the jury for the sake of comparison. Very likely the jury's moderate verdict on only a few of the many counts submitted by the government and supported by the testimony of those who had been led to send their orders through the mail was because of this wide scope given the defense. As the judge pointed out in imposing sentence, defendant has been convicted several times before under both state and federal law. Indeed this case and our discussions somewhat duplicate his earlier appearance in *Roth v. Goldman*, 2 Cir., 172 F.2d 788, certiorari denied 337 U.S. 938, 69 S. Ct. 1514, 93 L. Ed. 1743.

Defendant claims error in entrapment because his advertisements were answered by government representatives. But this method of obtaining evidence was specifically approved in *Rosen v. United States*, supra, 161 U.S. 29, 42, 16 S. Ct. 434, 438, 480, and has been usual at least ever since. *Ackley v. United States*, 8 Cir., 200 F. 217, 222. In no event was there any improper entrapment. See *United States v. Masciale*, 2 Cir., 236 F.2d 601. The government's summation in the case was within the scope of the evidence, and the court's charge was concise and correct. But one other matter needs to engage our attention. That was the defendant's claim of error in that the court charged with respect to the statute as it was at the time of the offenses, although it had been amended on June 28, 1955, or before the trial. But this amendment was designed to stiffen the Act and arose because in *Alpers v. United States*, 9 Cir., 175 F.2d 137, a conviction for mailing obscene phonograph records was reversed on the ground that such records were not clearly embodied in the statutory language quoted above. Although this decision was reversed and the conviction reinstated in *United States v. Alpers*, supra, 338 U.S. 680, 70 S. Ct. 352, the Congress was so anxious that there be no loophole that it enacted an amendment making unmailable now " [e]very obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance."⁷ It would seem clear, therefore, that defendant has no ground of complaint

because he was tried under the statute existing at the time of his offense; and in no event could he have been harmed.

Judgment affirmed.

FRANK, Circuit Judge (concurring).

The reference in Judge Clark's opinion to juvenile delinquency might lead the casual reader to suppose that, under the statute, the test of what constitutes obscenity is its effect on minors, and that the defendant, Roth, has been convicted for mailing obscene writings to (or for sale to) children. This court, however, in *United States v. Levine*, 2 Cir., 83 F.2d 156, has held that the correct test is the effect on the sexual thoughts and desires, not of the "young" or "immature," but of average, normal, adult persons. The trial judge here so instructed the jury.¹

On the basis of that test, the jury could reasonably have found, beyond a reasonable doubt, that many of the books, periodicals, pamphlets and pictures which defendant mailed were obscene. Accordingly, I concur.²

I do so although I have much difficulty in reconciling the validity of that statute with opinions of the Supreme Court, uttered within the past twenty-five years,³ relative to the First Amendment as applied to other kinds of legislation. The doctrine expressed in those opinions, as I understand it, may be summarized briefly as follows: Any statute authorizing governmental interference (whether by "prior restraint" or punishment) with free speech or free press runs counter to the First Amendment, except when the government can show that the statute strikes at words which are likely to incite to a breach of the peace,⁴ or with sufficient probability tend either to the overthrow of the government by illegal means or to some other overt anti-social conduct.⁵

The troublesome aspect of the federal obscenity statute — as I shall try to explain in the Appendix to this opinion — is that (a) no one can now show that, with any reasonable probability obscene publications tend to have any effects on the behavior of normal, average adults, and (b) that under that statute, as judicially interpreted, punishment is apparently inflicted for provoking, in such adults, undesirable sexual thoughts, feelings, or desires — not overt dangerous or anti-social conduct, either actual or probable.

Often the discussion of First Amendment exceptions has been couched in terms of a "clear and present danger". However, the meaning of that phrase has been somewhat watered down by *Dennis v. United States*, 341 U.S. 494, 71 S. Ct. 857, 865, 95 L. Ed. 1137. The test now involves probability: "In each case (courts) must ask", said Chief Justice Vinson in

Dennis, "whether the gravity of the "evil," discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger." It has been suggested that the test now is this: "The more serious and threatened the evil, the lower the required degree of probability."⁶ It would seem to follow that the less clear the danger, the more imminent must it be. At any rate, it would seem that (1) the danger or evil must be clear (i. e., identifiable) and substantial, and (2) that, since the statute renders words punishable, it is invalid unless those words tend, with a fairly high degree of probability, to incite to overt conduct which is obviously harmful. For, under the First Amendment, lawless or anti-social "acts are the main thing. Speech is not punishable for its own sake, but only because of its connection with those * * * acts * * * But more than a remote connection is necessary * * *"⁷ See, e. g., American Communications Ass'n, C.I.O. v. Douds, 339 U.S. 382, 398, 70 S. Ct. 674, 683, 94 L. Ed. 925, as to "the right of the public to be protected from *evils of conduct*, even though the First Amendment rights of persons or groups are thereby in some manner infringed". (Emphasis added.)

As I read the Supreme Court's opinions, the government, in defending the constitutionality of a statute which curbs free expression, may not rely on the usual "presumption of validity." No matter how one may articulate the reasoning, it is now accepted doctrine that, when legislation affects free speech or free press, the government must show that the legislation comes within one of the exceptions described above. See, e. g., Dennis v. United States, 341 U.S. 494, 71 S. Ct. 857, 95 L. Ed. 1137; Joseph Burstyn, Inc., v. Wilson, 343 U.S. 495, 503, 72 S. Ct. 777, 96 L. Ed. 1098. Moreover, when legislation affects free expression, the void-for-vagueness doctrine has a peculiar importance; and the obscenity statute is exquisitely vague. (See the Appendix, point 9.)

True, the Supreme Court has said several times that the federal obscenity statute (or any such state statute) is constitutional. But the Court has not directly so decided; it has done so *sub silentio* in applying the federal statute, or has referred to the constitutionality of such legislation in dicta. The Court has not thoroughly canvassed the problem in any opinion, nor applied to it the doctrine (summarized above) concerning the First Amendment which the Court has evolved in recent years. I base that statement on the following analysis of the cases:

In *Ex parte Jackson*, 1877, 96 U.S. 727, 24 L. Ed. 877, the Court held valid a statute relating to the mailing of letters, or circulars, concerning lotteries. Such letters or circulars might well induce the addressees to engage in the overt conduct of engaging in lotteries. The Court, only in passing, referred to the obscenity statute and said it, too, was valid.

In *Rosen v. United States*, 1896, 161 U.S. 29, 16 S. Ct. 434, 480, 40 L. Ed. 606, the issue was solely the sufficiency of an indictment under the obscenity statute, not the validity of that legislation, and the Court did not discuss its validity.

In *Swearingen v. United States*, 1896, 161 U.S. 446, 16 S. Ct. 562, 40 L. Ed. 765, the Court reversed a conviction under the obscenity statute; it did not consider its constitutionality.

Dunlop v. United States, 1896, 165 U.S. 486, at page 501, 17 S. Ct. 375, at page 380, 41 L. Ed. 799, did not discuss the constitutionality of the statute; moreover, the opinion shows that it dealt with advertisements soliciting improper sexual relations, i. e., with probable conduct, not with mere thoughts or desires.

In *Public Clearing House v. Coyne*, 1904, 194 U.S. 497, at page 508, 24 S. Ct. 789, at page 793, 48 L. Ed. 1092, which did not involve the validity of the obscenity Act, the Court said in passing that its constitutionality "has never been attacked."

In *United States v. Limehouse*, 1932, 285 U.S. 424, 52 S. Ct. 412, 76 L. Ed. 843, the Court decided the correct interpretation of the word "filthy" in the statute, and did not consider the question of constitutionality. Moreover, there the defendant had mailed letters attacking the characters of the recipients who might well have been moved to conduct in breach of the peace.

In *Winters v. People of State of New York*, 1948, 333 U.S. 507, 68 S. Ct. 665, 92 L. Ed. 840, the Court held void for vagueness a state statute making it a crime to distribute publications consisting principally of news or stories of criminal deeds of bloodshed or lust so massed as to become vehicles for inciting violent and depraved crimes. The Court said in passing, 333 U.S. at page 510, 68 S. Ct. at page 667, that legislation subjecting obscene publications to governmental control is valid.

In *Doubleday & Co. v. People of State of New York*, 1948, 335 U.S. 848, 69 S. Ct. 79, 93 L. Ed. 398, the Court, by an evenly divided vote, without opinion affirmed a state court decision sustaining a state obscenity statute.

In *United States v. Alpers*, 1950, 338 U.S. 680, 70 S. Ct. 352, 94 L. Ed. 457, the Court construed the statute as amended, and affirmed a conviction thereunder, but did not consider its constitutionality.

In the following cases, where the validity of no obscenity statute was involved, the Court, in passing, referred to such legislation as valid: *Robertson v. Baldwin*, 1897, 165 U.S. 275, 281, 17 S. Ct. 326, 41 L. Ed. 715; *Near v. State of Minnesota*, 1931, 283 U.S. 697, 716, 51 S. Ct.

625, 75 L. Ed. 1357; *Lovell v. City of Griffin*, 1938, 303 U.S. 444, 451, 58 S. Ct. 666, 82 L. Ed. 949; *Chaplinsky v. State of New Hampshire*, 1942, 315 U.S. 568, 571-572, 62 S. Ct. 766, 86 L. Ed. 1031; *Beauharnais v. People of State of Illinois*, 1952, 343 U.S. 250, 266, 72 S. Ct. 725, 96 L. Ed. 919.

I agree with my colleagues that, since ours is an inferior court, we should not hold invalid a statute which our superior has thus often said is constitutional (albeit without any full discussion). Yet I think it not improper to set forth, as I do in the Appendix, considerations concerning the obscenity statute's validity with which, up to now, I think the Supreme Court has not dealt in any of its opinions. I do not suggest the inevitability of the conclusion that that statute is unconstitutional. I do suggest that it is hard to avoid that conclusion, if one applies to that legislation the reasoning the Supreme Court has applied to other sorts of legislation. Perhaps I have overlooked conceivable compelling contrary arguments. If so, maybe my Appendix will evoke them.

To preclude misunderstanding of my purpose in stirring doubts about this statute, I think it well to add the following:

(a) As many of the publications mailed by defendant offend my personal taste, I would not cross a street to obtain them for nothing; I happen not to be interested in so-called "pornography"; and I think defendant's motives obnoxious. But if the statute were invalid, the merit of those publications would be irrelevant. *Winters v. People of State of New York*, 333 U.S. 507, 510, 68 S. Ct. 665, 92 L. Ed. 840. So, too, as to defendant's motives: "Although the defendant may be the worst of men * * * the rights of the best of men are secure only as the rights of the vilest and most abhorrent are protected."⁸

(b) It is most doubtful (as explained in the Appendix) whether anyone can now demonstrate that children's reading or looking at obscene matter has a probable causal relation to the children's anti-social conduct.⁹ If, however, such a probable causal relation could be shown, there could be little doubt, I think, of the validity of a statute (if so worded as to avoid undue ambiguity) which specifically prohibits the distribution by mail of obscene publications for sale to young people. But discussion of such legislation is here irrelevant, since, to repeat, the existing federal statute is not thus restricted.

(c) Congress undoubtedly has wide power to protect public morals. But the First Amendment severely limits that power in the area of free speech and free press.

(d) It is argued that anti-obscenity legislation is valid because, at the time of the adoption of the First Amendment, obscenity was a common law crime. Relying (*inter alia*) on *Bridges v. State of California*, 314 U.S. 252, 264-265, 62 S. Ct. 190, 86 L. Ed. 192 and *Grosjean v.*

American Press Co., 297 U.S. 233, 248-249, 56 S. Ct. 444, 80 L. Ed. 660, I have tried in the Appendix to answer that argument.

(e) The First Amendment, of course, does not prevent any private body or group (including any Church) from instructing, or seeking to persuade, its adherents or others not to read or distribute obscene (or other) publications. That constitutional provision — safeguarding a principle indispensable in a true democracy — leaves unhampered all non-governmental means of molding public opinion about not reading literature which some think undesirable; and, in that respect, experience teaches that democratically exercised censorship by public opinion has far more potency, and is far less easily evaded, than censorship by government.¹⁰ The incessant struggle to influence public opinion is of the very essence of the democratic process. A basic purpose of the First Amendment is to keep that struggle alive, by not permitting the dominant public opinion of the present to become embodied in legislation which will prevent the formation of a different dominant public opinion in the future.¹¹

(f) At first glance it may seem almost frivolous to raise any question about the constitutionality of the obscenity statute at a time when many seemingly graver First Amendment problems confront the courts. But (for reasons stated in more detail in the Appendix) governmental censorship of writings, merely because they may stimulate, in the reader, sexual thoughts the legislature deems undesirable, has more serious implications than appear at first glance: We have been warned by eminent thinkers of the easy path from any apparently mild governmental control of what adult citizens may read to governmental control of adult's political and religious reading. John Milton, Thomas Jefferson, James Madison, J. S. Mill and Tocqueville have pointed out that any paternalistic guardianship by government of the thoughts of grown-up citizens enervates their spirit, keeps them immature, all too ready to adopt towards government officers the attitude that, in general, "Papa knows best." If the government possesses the power to censor publications which arouse sexual thoughts, regardless of whether those thoughts tend probably to transform themselves into anti-social behavior, why may not the government censor political and religious publications regardless of any causal relation to probable dangerous deeds? And even if we confine attention to official censorship of publications tending to stimulate sexual thoughts, it should be asked why, at any moment, that censorship cannot be extended to advertisements and true reports or photographs, in our daily press, which, fully as much, may stimulate such thoughts?

(g) Assuming, *arguendo*, that a statute aims at an altogether desirable end, nevertheless its desirability does not render it constitutional. As the Supreme Court has said, "The good sought in unconstitutional legislation is an insidious feature, because it leads citizens and

legislatures of good purpose to promote it without thought of the serious break it will make in the ark of our covenant. * * *"¹²

In a concurring opinion in *Roth v. Goldman*, 2 Cir., 1948, 172 F.2d 788, 790, I voiced puzzlement about the constitutionality of administrative prior restraint of obscene books. I then had little doubt about the validity of a purely punitive obscenity statute. But the next year, in *Commonwealth v. Gordon*, 1949, 66 Pa.Dist. & Co. R. 101, Judge Curtis Bok, one of America's most reflective judges, directly attacked the validity of any such punitive legislation. His brilliant opinion, which states arguments that (so far as I know) have never been answered, nudged me into the skeptical views contained in this opinion and the Appendix.

Appendix

As a judge of an inferior court, I am constrained by opinions of the Supreme Court concerning the obscenity statute to hold that legislation valid. Since, however, I think (as indicated in the foregoing) that none of those opinions has carefully canvassed the problem in the light of the Supreme Court's interpretation of the First Amendment, especially as expressed by the Court in recent years, I deem it not improper to set forth, in the following, factors which I think deserve consideration in passing on the constitutionality of that statute.

1. Benjamin Franklin, in 1776 unanimously designated Postmaster General by the First Continental Congress, is appropriately known as the "father of the Post Office." Among his published writings are two¹ — *Letter of Advice to Young Men on the Proper Choosing of a Mistress* and *The Speech of Polly Baker* — which a jury could reasonably find "obscene," according to the judge's instructions in the case at bar. On that basis, if tomorrow a man were to send those works of Franklin through the mails, he would be subject to prosecution and (if the jury found him guilty) to punishment under the federal obscenity statute.²

That fact would surely have astonished Jefferson, who extolled Franklin as an American genius,³ called him "venerable and beloved" of his countrymen,⁴ and wrote approvingly of Franklin's *Polly Baker*.⁵ No less would it have astonished Madison, also an admirer of Franklin (whom he described as a man whose "genius" was "an ornament of human nature")^{5a} and himself given to telling "Rabelaisian anecdotes."⁶ Nor was the taste of these men unique in the American Colonies: "Many a library of a colonial planter in Virginia or a colonial intellectual in New England boasted copies of *Tom Jones*, *Tristram Shandy*, *Ovid's Art of Love*, and *Rabelais*. * * *"⁷

As, with Jefferson's encouragement, Madison, in the first session of Congress, introduced what became the First Amendment, it seems doubtful that the constitutional guaranty of free speech and free press could have been intended to allow Congress validity to enact the "obscenity" Act. That doubt receives reinforcement from the following:

In 1799, eight years after the adoption of the First Amendment, Madison, in an Address to the General Assembly of Virginia,⁸ said that the "truth of opinion" ought not to be subject to "imprisonment, to be inflicted by those of a different opinion"; he there also asserted that it would subvert the First Amendment⁹ to make a "distinction between the freedom and the licentiousness of the press." Previously, in 1792, he wrote that "a man has property in his opinions and free communication of them," and that a government which "violates the property which individuals have in their opinion * * * is not a pattern for the United States."¹⁰ Jefferson's proposed Constitution for Virginia (1776), provided: "Printing presses shall be free, except so far as by commission of private injury cause may be given of private action."¹¹ In his Second Inaugural Address (1805), he said: "No inference is here intended that the laws provided by the State against false and defamatory publications should not be enforced * * * The press, confined to truth, needs no other restraint * * *; and no other definite line can be drawn between the inestimable liberty of the press and demoralizing licentiousness. If there still be improprieties which this rule would not restrain, its supplement must be sought in the censorship of public opinion."

The broad phrase in the First Amendment, prohibiting legislation abridging "freedom of speech, or of the press", includes the right to speak and write freely for the public concerning any subject. As the Amendment specifically refers to "the free exercise [of religion]" and to the right "of the people * * * to assemble" and to "petition the Government for a redress of grievances", it specifically includes the right freely to speak to and write for the public concerning government and religion; but it does not limit this right to those topics. Accordingly, the views of Jefferson and Madison about the freedom to speak and write concerning religion are relevant to a consideration of the constitutional freedom in respect of all other subjects. Consider, then, what those men said about freedom of religious discussion: Madison, in 1799, denouncing the distinction "between the freedom and the licentiousness of the press" said, "By its help, the judge as to what is licentious may escape through any constitutional restriction," and added, "Under it, Congress might denominate a religion to be heretical and licentious, and proceed to its suppression * * * Remember * * * that it is to the press mankind are indebted for having dispelled the clouds which long encompassed religion * * *"¹² Jefferson, in 1798, quoting the First Amendment, said it guarded "in the same sentence, and under the same words, the freedom of religion, of speech, and of the press; insomuch, that whatever violates either, throws down the

sanctuary which covers the others."¹³ In 1814, he wrote in a letter, "I am really mortified to be told that in the United States of America, a fact like this (the sale of a book) can become a subject of inquiry, and of criminal inquiry too, as an offense against religion; that (such) a question can be carried before the civil magistrate. Is this then our freedom of religion? And are we to have a censor whose imprimatur shall say what books may be sold and what we may buy? * * * Whose foot is to be the measure to which ours are all to be cut or stretched?"¹⁴

Those utterances high-light this fact: Freedom to speak publicly and to publish has, as its inevitable and important correlative, the private rights to hear, to read, and to think and to feel about what one hears and reads. The First Amendment protects those private rights of hearers and readers.

We should not forget that, prompted by Jefferson,¹⁵ Madison (who at one time had doubted the wisdom of a Bill of Rights)¹⁶ when he urged in Congress the enactment of what became the first ten Amendments, declared, "If they are incorporated into the Constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardian of those rights; they will be an impenetrable barrier against every assumption of power in the Legislative or Executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights."¹⁷ In short, the Bill of Rights, including the First Amendment, was not designed merely as a set of admonitions to the legislature and the executive; its provisions were to be enforced by the courts.

Judicial enforcement necessarily entails judicial interpretation. The question therefore arises whether the courts, in enforcing the First Amendment, should interpret it in accord with the views prevalent among those who sponsored and adopted it or in accord with subsequently developed views which would sanction legislation more restrictive of free speech and free press.

So the following becomes pertinent: Some of those who in the 20th Century endorse legislation suppressing "obscene" literature have an attitude towards freedom of expression which does not match that of the framers of the First Amendment (adopted at the end of the 18th Century) but does stem from an attitude, towards writings dealing with sex, which arose decades later, in the mid-19th Century, and is therefore labelled — doubtless too sweepingly — "Victorian." It was a dogma of "Victorian morality" that sexual misbehavior would be encouraged if one were to "acknowledge its existence or at any rate to present it vividly enough to form a life-like image of it in the reader's mind"; this morality rested on a "faith that you could best conquer evil by shutting your eyes to its existence,"¹⁸ and on a

kind of word magic.¹⁹ The demands at that time for "decency" in published words did not comport with the actual sexual conduct of many of those who made those demands: "The Victorians, as a general rule, managed to conceal the 'coarser' side of their lives so thoroughly under a mask of respectability that we often fail to realize how 'coarse' it really was * * * Could we have recourse to the vast unwritten literature of bawdry, we should be able to form a more veracious notion of life as it (then) really was." The respectable of those days often, "with unblushing license," held "high revels" in "night houses."²⁰ Thanks to them, Mrs. Warren's profession flourished, but it was considered sinful to talk about it in books.²¹ Such a prudish and purely verbal moral code, at odds (more or less hypocritically) with the actual conduct of its adherents²² was (as we have seen) not the moral code of those who framed the First Amendment.²³ One would suppose, then, that the courts should interpret and enforce that Amendment according to the views of those framers, not according to the later "Victorian" code.²⁴

It has been argued that the federal obscenity statute is valid because obscenity was a common law crime at the time of the adoption of the First Amendment. Quite aside from the fact that, previous to the Amendment, there had been scant recognition of this crime, the short answer seems to be that the framers of the Amendment knowingly and deliberately intended to depart from the English common law as to freedom of speech and freedom of the press. See *Grosjean v. American Press Co.*, 297 U.S. 233, 248-249, 56 S. Ct. 444, 80 L. Ed. 660; *Bridges v. State of California*, 314 U.S. 252, 264-265, 62 S. Ct. 190, 86 L. Ed. 192;^{24a} *Patterson, Free Speech and a Free Press* (1939) 101-102, 124-125, 128; *Schofield*, 2 *Constitutional Law and Equity* (1921) 521-525.

Of course, the legislature has wide power to protect what it considers public morals. But the First Amendment severely circumscribes that power (and all other legislative powers) in the area of speech and free press.

For a long time, much was made of the distinction between a statute calling for "prior restraint" and one providing subsequent criminal punishment;²⁵ the former alone, it was once said, raised any question of constitutionality *vis-à-vis* the First Amendment.²⁶ Although it may still be true that more is required to justify legislation providing "preventive" than "punitive" censorship,²⁷ this distinction has been substantially eroded. See, e. g., *Dennis v. United States*, 341 U.S. 494, 71 S. Ct. 857, 95 L. Ed. 1137; *Schenck v. United States*, 249 U.S. 47, 39 S. Ct. 247, 63 L. Ed. 470; *De Jonge v. State of Oregon*, 299 U.S. 353, 57 S. Ct. 255, 81 L. Ed. 278; *Thornhill v. State of Alabama*, 310 U.S. 88, 97-98, 60 S. Ct. 736, 84 L. Ed. 1093; *Chaplinsky v. State of New Hampshire*, 315 U.S. 568, 572, Note 3, 62 S. Ct. 766, 86 L. Ed. 1031. See also Hale, *Freedom Through Law* (1952) 257-265; Emerson, *The Doctrine of Prior Restraint*, 20 *Law & Contemp. Problems* (1955) 648 (a

thought-stirring discussion of the problem); *Kalven*, loc. cit. at 8-10, 13. (For further discussion of this theme, see *infra*.)

The statute, as judicially interpreted, authorizes punishment for inducing mere thoughts, and feelings, or desires

For a time, American courts adopted the test of obscenity contrived in 1868 by Cockburn, L.J., in *Queen v. Hicklin*, L.R. 3 Q.B. 360: "I think the test of obscenity is this, whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort might fall." He added that the book there in question "would suggest * * thoughts of a most impure and libidinous character."

The test in most federal courts has changed: They do not now speak of the thoughts of "those whose minds are open to * * * immoral influences" but, instead, of the thoughts of average adult normal men and women, determining what these thoughts are, not by proof at the trial, but by the standard of "the average conscience of the time," the current "social sense of what is right." See, e. g., *United States v. Kennerley*, D.C., 209 F. 119, 121; *United States v. Levine*, 2 Cir., 83 F.2d 156, 157; *Parmelee v. United States*, 72 App.D.C. 203, 113 F.2d 729. Yet the courts still define obscenity in terms of the assumed average normal adult reader's sexual thoughts or desires or impulses, without reference to any relation between those "subjective" reactions and his subsequent conduct. The judicial opinions use such key phrases as this: "suggesting lewd thoughts and exciting sensual desires;"²⁸ "arouse the salacity of the reader,"²⁹ "allowing or implanting * * * obscene, lewd, or lascivious thoughts or desires",³⁰ "arouse sexual desires".^{30a} The judge's charge in the instant case reads accordingly: "It must tend to stir sexual impulses and lead to sexually impure thoughts." Thus the statute, as the courts construe it, appears to provide criminal punishment for inducing no more than thoughts, feelings, desires.

No adequate knowledge is available concerning the effects on the conduct of normal adults of reading or seeing the "obscene"

Suppose we assume, *arguendo*, that sexual thoughts or feelings, stirred by the "obscene," probably will often issue into overt conduct. Still it does not at all follow that that conduct will be antisocial. For no sane person can believe it socially harmful if sexual desires lead to normal, and not anti-social, sexual behavior since, without such behavior, the human race would soon disappear.³¹

Doubtless, Congress could validly provide punishment for mailing any publications if there were some moderately substantial reliable data showing that reading or seeing those

publications probably conduces to seriously harmful sexual conduct on the part of normal adult human beings. But we have no such data.

Suppose it argued that whatever excites sexual longings might *possibly* produce sexual misconduct. That cannot suffice: Notoriously, perfumes sometimes act as aphrodisiacs, yet no one will suggest that therefore Congress may constitutionally legislate punishment for mailing perfumes. It may be that among the stimuli to irregular sexual conduct, by normal men and women, may be almost anything — the odor of carnations or cheese, the sight of a cane or a candle or a shoe, the touch of silk or a gunnysack. For all anyone now knows, stimuli of that sort may be far more provocative of such misconduct than reading obscene books or seeing obscene pictures. Said John Milton, "Evil manners are as perfectly learnt, without books, a thousand other ways that cannot be stopped."

To date there exist, I think, no thorough-going studies by competent persons which justify the conclusion that normal adults' reading or seeing of the "obscene" probably induces anti-social conduct. Such competent studies as have been made do conclude that so complex and numerous are the causes of sexual vice that it is impossible to assert with any assurance that "obscenity" represents a ponderable causal factor in sexually deviant adult behavior. "Although the whole subject of obscenity censorship hinges upon the unproved assumption that 'obscene' literature is a significant factor in causing sexual deviation from the community standard, no report can be found of a single effort at genuine research to test this assumption by singling out as a factor for study the effect of sex literature upon sexual behavior."³² What little competent research has been done, points definitely in a direction precisely opposite to that assumption.

Alpert reports³³ that, when, in the 1920s, 409 women college graduates were asked to state in writing what things stimulated them sexually, they answered thus: 218 said "Man"; 95 said books; 40 said drama; 29 said dancing; 18 said pictures; 9 said music. Of those who replied "that the source of their sex information came from books, not one specified a 'dirty' book as the source. Instead, the books listed were: The Bible, the dictionary, the encyclopedia, novels from Dickens to Henry James, circulars about venereal diseases, medical books, and Motley's Rise of the Dutch Republic." Macaulay, replying to advocates of the suppression of obscene books, said: "We find it difficult to believe that in a world so full of temptations as this, any gentleman whose life would have been virtuous if he had not read Aristophanes or Juvenal, will be vicious by reading them." Echoing Macaulay, "Jimmy" Walker remarked that he had never heard of a woman seduced by a book. New Mexico has never had an obscenity statute; there is no evidence that, in that state, sexual misconduct is proportionately greater than elsewhere.

Most federal courts (as above noted) now hold that the test of obscenity is the effect on the "mind" of the average normal adult, that effect being determined by the "average conscience of the time," the current "sense of what is right"; and that the statute does not intend "to reduce our treatment of sex to the standard of a child's library in the supposed interest of a salacious few"; *United States v. Kennerley*, D.C., 209 F. 120, 121.

However, there is much pressure for legislation, designed to prevent juvenile delinquency, which will single out children, i. e., will prohibit the sale to young persons of "obscenity" or other designated matter. That problem does not present itself here, since the federal statute is not thus limited. The trial judge in his charge in the instant case told the jury that the "test" under that statute is not the effect of the mailed matter on "those comprising a particular segment of the community", the "young" or "the immature"; and see *United States v. Levine*, 2 Cir., 83 F.2d 156, 157.

Therefore a discussion of such a children's protective statute is irrelevant here. But, since Judge Clark does discuss the alleged linkage of obscenity to juvenile delinquency, and since it may perhaps be thought that it has some bearing on the question of the effect of obscenity on adult conduct, I too shall discuss it.

The following is a recent summary of studies of that subject:^{33a} "(1) Scientific^{33b} studies of juvenile delinquency demonstrate that those who get into trouble, and are the greatest concern of the advocates of censorship, are far less inclined to read than those who do not become delinquent. The delinquents are generally the adventurous type, who have little use for reading and other nonactive entertainment. Thus, even assuming that reading sometimes has an adverse effect upon moral behavior, the effect is not likely to be substantial, for those who are susceptible seldom read. (2) Sheldon and Eleanor Glueck, who are among the country's leading authorities on the treatment and causes of juvenile delinquency, have recently published the results of a ten-year study of its causes. They exhaustively studied approximately 90 factors and influences that might lead to or explain juvenile delinquency; but the Gluecks gave no consideration to the type of reading material, if any were read by the delinquents. This is, of course, consistent with their finding that delinquents read very little. When those who know so much about the problem of delinquency among youth — the very group about whom the advocates of censorship are most concerned — conclude that what delinquents read has so little effect upon their conduct that it is not worth investigating in an exhaustive study of causes, there is good reason for serious doubts concerning the basic hypothesis on which obscenity censorship is dependent. (3) The many other influences in society that stimulate sexual desire are so much more frequent in their influence and so much more potent in their effect that the

influence of reading is likely, at most, to be relatively insignificant in the composite of forces that lead an individual into conduct deviating from the community sex standards. * * * And the studies demonstrating that sex knowledge seldom results from reading indicates the relative unimportance of literature in sexual thoughts and behavior as compared with other factors in society." ³⁴

Judge Clark, however, speaks of "the strongly held views of those with competence in the premises as to the very direct connection" of obscenity "with the development of juvenile delinquency." He cites and quotes from a recent opinion of the New York Court of Appeals and an article by Judge Vanderbilt, which in turn, cite the writings of persons thus described by Judge Clark as "those with competence in the premises." One of the cited writings is a report, by Dr. Jahoda and associates, entitled *The Impact of Literature: A Psychological Discussion of Some Assumptions in the Censorship Debate* (1954). ³⁵ I have read this report (which is a careful survey of all available studies and psychological theories). I think it expresses an attitude quite contrary to that indicated by Judge Clark. In order to avoid any possible bias in my interpretation of that report, I thought it well to ask Dr. Jahoda to write her own summary of it, which, with her permission, I shall quote. (In doing so, I am following the example of Mr. Justice Jackson who, in *Federal Trade Commission v. Ruberoid Co.*, 343 U.S. 470, 485, 72 S. Ct. 800, 809, 96 L. Ed. 1081, acknowledged that he relied on "an unpublished treatise", i. e., one not available to the parties. If that practice is proper, I think it similarly proper to quote an author's unpublished interpretation of a published treatise.) Dr. Jahoda's summary reads as follows:

"Persons who argue for increased censorship of printed matter often operate on the assumption that reading about sexual matters or about violence and brutality leads to anti-social actions, particularly to juvenile delinquency. An examination of the pertinent psychological literature has led to the following conclusions:

"1. There exists no research evidence either to prove or to disprove this assumption definitively.

"2. In the absence of scientific proof two lines of psychological approach to the examination of the assumption are possible: (a) a review of what is known on the causes of juvenile delinquency; and (b) review of what is known about the effect of literature on the mind of the reader.

"3. In the vast research literature on the causes of juvenile delinquency there is no evidence to justify the assumption that reading about sexual matters or about violence leads to delinquent acts. Experts on juvenile delinquency agree that it has no single cause. Most of

them regard early childhood events, which precede the reading age, as a necessary condition for later delinquency. At a later age, the nature of personal relations is assumed to have much greater power in determining a delinquent career than the vicarious experiences provided by reading matter. Juvenile delinquents as a group read less, and less easily, than non-delinquents. Individual instances are reported in which so-called 'good' books allegedly influenced a delinquent in the manner in which 'bad' books are assumed to influence him.

"Where childhood experiences and subsequent events have combined to make delinquency psychologically likely, reading could have one of two effects: it could serve a trigger function releasing the criminal act or it could provide for a substitute outlet of aggression in fantasy, dispensing with the need for criminal action. There is no empirical evidence in either direction.

"4. With regard to the impact of literature on the mind of the reader, it must be pointed out that there is a vast overlap in content between all media of mass communication. The daily press, television, radio, movies, books and comics all present their share of so-called 'bad' material, some with great realism as reports of actual events, some in clearly fictionalized form. It is virtually impossible to isolate the impact of one of these media on a population exposed to all of them. Some evidence suggests that the particular communications which arrest the attention of an individual are in good part a matter of choice. As a rule, people do not expose themselves to everything that is offered, but only to what agrees with their inclinations.

"Children, who have often not yet crystallized their preferences and have more unspecific curiosity than many adults, are therefore perhaps more open to accidental influences from literature. This may present a danger to youngsters who are insecure or maladjusted who find in reading (of 'bad' books as well as of 'good' books) an escape from reality which they do not dare face. Needs which are not met in the real world are gratified in a fantasy world. It is likely, though not fully demonstrated, that excessive reading of comic books will intensify in children those qualities which drove them to the comic book world to begin with: an inability to face the world, apathy, a belief that the individual is hopelessly impotent and driven by uncontrollable forces and, hence, an acceptance of violence and brutality in the real world.

"It should be noted that insofar as causal sequence is implied, insecurity and maladjustment in a child must precede this exposure to the written word in order to lead to these potential effects. Unfortunately, perhaps, the reading of Shakespeare's tragedies or of Anderson's and Grimm's fairy tales might do much the same."

Most of the current discussion of the relation between children's reading and juvenile delinquency has to do with so-called "comic books" which center on violence (sometimes coupled with sex) rather than mere obscenity. Judge Vanderbilt, in an article from which Judge Clark quotes, cites Feder, *Comic Book Regulation* (University of California, Bureau of Public Administration, 1955 Legislative Problems No. 2).³⁶ Feder writes: "It has never been determined definitely whether or not comics portraying violence, crime and horror are a cause of juvenile delinquency."

Judge Vanderbilt, in the article from which Judge Clark quotes, also cites Wertham, *Seduction of the Innocent* (1954).³⁷ Dr. Wertham is the foremost proponent of the view that "comic books" do contribute to juvenile delinquency. The Jahoda Report takes issue with Dr. Wertham, who relies much on a variety of the *post-hoc-ergo-propter-hoc* variety of argument, i. e., youths who had read "comic books" became delinquents. The argument, at best, proves too much: Dr. Wertham points to the millions of young readers of such books; but only a fraction of these readers become delinquents. Many of the latter also chew gum, drink coca-cola, and wear soft-soled shoes. Moreover, Dr. Wertham specifically says (p. 298) that he is little concerned with allegedly obscene publications designed for reading by adults, and (pp. 303, 316, 348) that the legislation which he advocates would do no more than forbid the sale or display of "comic books" to minors. As previously noted, the federal obscenity statute is not so restricted.

Maybe some day we will have enough reliable data to show that obscene books and pictures do tend to influence children's sexual conduct adversely. Then a federal statute could be enacted which would avoid constitutional defects by authorizing punishment for using the mails or interstate shipments in the sale of such books and pictures to children.³⁸

It is, however, not at all clear that children would be ignorant, in any considerable measure, of obscenity, if no obscene publications ever came into their hands. Youngsters get a vast deal of education in sexual smut from companions of their own age.³⁹ A verbatim report of conversations among young teen-age boys (from average respectable homes) will disclose their amazing proficiency in obscene language, learned from other boys.⁴⁰ Replying to the argument of the need for censorship to protect the young Milton said: "Who shall regulate all the * * * conversation of our youth * * * appoint what shall be discussed * * *?" Most judges who reject that view are long past their youth and have probably forgotten the conversational ways of that period of life: "I remember when I was a little boy," said Mr. Dooley, "but I don't remember how I was a little boy."

Let it be assumed, for the sake of the argument, that contemplation of published matter dealing with sex has a significant impact on children's conduct. On that assumption, we

cannot overlook the fact that our most reputable newspapers and periodicals carry advertisements and photographs displaying women in what decidedly are sexually alluring postures,⁴¹ and at times emphasizing the importance of "sex appeal." That women are there shown scantily clad, increases "the mystery and allure of the bodies that are hidden," writes an eminent psychiatrist. "A leg covered by a silk stocking is much more attractive than a naked one; a bosom pushed into shape by a brassiere is more alluring than the pendant realities."⁴² Either, then, the statute must be sternly applied to prevent the mailing of many reputable newspapers and periodicals containing such ads and photographs, or else we must acknowledge that they have created a cultural atmosphere for children in which, at a maximum, only the most trifling additional effect can be imputed to children's perusal of the kind of matter mailed by the defendant.

Because of the contrary views of many competent persons, one may well be sceptical about Dr. Wertham's thesis. However, let us see what, logically, his crusade would do to the daily press: After referring repeatedly to the descriptions, in "comic books" and other "mass media," of violence combined with sadistic sexual behavior, descriptions which he says contribute to juvenile delinquency, he writes, "Juvenile delinquency reflects the social values current in a society. Both adults and children absorb these social values in their daily lives, * * * and also in *all the communications through the mass media* * * * Juvenile delinquency holds up a mirror to society * * * It is self-understood that such a pattern in a mass medium does not come from nothing * * * Comic books are not the disease, they are only a symptom * * * The same social forces that made comic books make other social evils, and the same social forces that keep comic crime books keep the other social evils the way they are." (Emphasis added.)

Now the daily newspapers, especially those with immense circulations, constitute an important part of the "mass media"; and each copy of a newspaper sells for much less than a "comic book." Virtually all the sorts of descriptions, of sex mingled with violence, which Dr. Wertham finds in the "comic books," can be found, often accompanied by gruesome photographs, in those daily journals. Even a newspaper which is considered unusually respectable, published prominently on its first page, on August 26, 1956, a true story of a "badly decomposed body" of a 24 year old woman school teacher, found in a clump of trees. The story reported that police had quoted a 29 year old salesman as saying that "he drove to the area" with the school teacher, that "the two had relations on the ground, and later got into an argument," after which he "struck her three times on the back of the head with a rock, and, leaving her there, drove away." Although today no one can so prove, one may suspect that such stories of sex and violence in the daily press have more impact on young readers than do those in the "comic books," since the daily press reports reality while the

"comic books" largely confine themselves to avowed fiction or fantasy.^{42a} Yet Dr. Wertham, and most others who propose legislation to curb the sale of "comic books" to children, propose that it should not extend to newspapers.^{42b} Why not?

The question is relevant in reference to the application of the obscenity statute: Are our prosecutors ready to prosecute reputable newspaper publishers under that Act? I think not. I do not at all urge such prosecutions. I do suggest that the validity of that statute has not been vigorously challenged because it has not been applied to important persons like those publishers but, instead, has been enforced principally against relatively inconspicuous men like the defendant here.

Da Capo: Available data seem wholly insufficient to show that the obscenity statutes come within any exception to the First Amendment.

I repeat that, because that statute is not restricted to obscene publications mailed for sale to minors, its validity should be tested in terms of the evil effects of adult reading of obscenity on adult conduct.⁴³ With the present lack of evidence that publications probably have such effects, how can the government discharge its burden of demonstrating sufficiently that the statute is within the narrow exceptions to the scope of the First Amendment? One would think that the mere possibility of a causal relation to misconduct ought surely not be enough.

Even if Congress had made an express legislative finding of the probable evil influence, on adult conduct, of adult reading or seeing obscene publications,^{43a} the courts would not be bound by that finding, if it were not justified in fact. See, e. g., *Chastleton Corp. v. Sinclair*, 264 U.S. 543, 44 S. Ct. 405, 406, 68 L. Ed. 841, where the Court (per Holmes, J.) said of a statute (declaring the existence of an emergency) that "a Court is not at liberty to shut its eyes to an obvious mistake, when the validity of the law depends upon the truth of what is declared." And the Court there and elsewhere has held that the judiciary may use judicial notice in ascertaining the truth of such a legislative declaration.⁴⁴

If the obscenity statute is valid, why may Congress not validly provide punishment for mailing books which will provoke thoughts it considers undesirable about religion or politics?

If the statute is valid, then, considering the foregoing, it would seem that its validity must rest on this ground: Congress, by statute, may constitutionally provide punishment for the mailing of books evoking mere thoughts or feelings about sex, if Congress considers them socially dangerous, even in the absence of any satisfactory evidence that those thoughts or feelings will tend to bring about socially harmful deeds. If that be correct, it is hard to

understand why, similarly, Congress may not constitutionally provide punishment for such distribution of books evoking mere thoughts or feelings, about religion or politics, which Congress considers socially dangerous, even in the absence of any satisfactory evidence that those thoughts or feelings will tend to bring about socially dangerous deeds.

2. The Judicial exception of the "classics"

As I have said, I have no doubt the jury could reasonably find, beyond a reasonable doubt, that many of the publications mailed by defendant were obscene within the current judicial definition of the term as explained by the trial judge in his charge to the jury. But so, too, are a multitude of recognized works of art found in public libraries. Compare, for instance, the books which are exhibits in this case with Montaigne's *Essay on Some Lines of Virgil* or with Chaucer. Or consider the many nude pictures which the defendant transmitted through the mails, and then turn to the reproductions in the articles on painting and sculpture in the *Encyclopedia Britannica* (14th edition):⁴⁵ Some of the latter are no less "obscene" than those which led to the defendants' conviction. Yet these *Encyclopedia* volumes are readily accessible to everyone, young or old, and, without let or hindrance, are frequently mailed to all parts of the country. Catalogues, of famous art museums, almost equally accessible and also often mailed, contain reproductions of paintings and sculpture, by great masters, no less "obscene."⁴⁶

To the argument that such books (and such reproductions of famous paintings and works of sculpture) fall within the statutory ban, the courts have answered that they are "classics," — books of "literary distinction" or works which have "an accepted place in the arts," including, so this court has held, Ovid's *Art of Love* and Boccaccio's *Decameron*.⁴⁷ There is a "curious dilemma" involved in this answer that the statute condemns "only books which are dull and without merit," that in no event will the statute be applied to the "classics," i. e., books "of literary distinction."⁴⁸ The courts have not explained how they escape that dilemma, but instead seem to have gone to sleep (although rather uncomfortably) on its horns.

This dilemma would seem to show up the basic constitutional flaw in the statute: No one can reconcile the currently accepted test of obscenity with the immunity of such "classics" as e. g., Aristophanes' *Lysistrata*, Chaucer's *Canterbury Tales*, Rabelais' *Gargantua and Pantagruel*, Shakespeare's *Venus and Adonis*, Fielding's *Tom Jones*, or Balzac's *Droll Stories*. For such "obscene" writings, just because of their greater artistry and charm, will presumably have far greater influence on readers than dull inartistic writings.

It will not do to differentiate a "classic," published in the past, on the ground that it comported with the average moral attitudes at the time and place of its original publication. Often this was not true. It was not true, for instance, of Balzac's *Droll Stories*,⁴⁹ a "classic" now freely circulated by many public libraries, and which therefore must have been transported by mail (or in interstate commerce). More to the point, if the issue is whether a book meets the American common conscience of the present time, the question is how "average" Americans now regard the book, not how it was regarded when first published, here or abroad. Why should the age of an "obscene" book be relevant? After how many years — 25 or 50 or 100 — does such a writing qualify as a "classic"?

The truth is that the courts have excepted the "classics" from the federal obscenity statute, since otherwise most Americans would be deprived of access to many masterpieces of literature and the pictorial arts, and a statute yielding such deprivation would not only be laughably absurd but would squarely oppose the intention of the cultivated men who framed and adopted the First Amendment.

This exception — nowhere to be found in the statute⁵⁰ — is a judge-made device invented to avoid that absurdity. The fact that the judges have felt the necessity of seeking that avoidance, serves to suggest forcibly that the statute, in its attempt to control what our citizens may read and see, violates the First Amendment. For no one can rationally justify the judge-made exception. The contention would scarcely pass as rational that the "classics" will be read or seen solely by an intellectual or artistic elite; for, even ignoring the snobbish, undemocratic, nature of this contention, there is no evidence that that elite has a moral fortitude (an immunity from moral corruption) superior to that of the "masses." And if the exception, to make it rational, were taken as meaning that a contemporary book is exempt if it equates in "literary distinction" with the "classics," the result would be amazing: Judges would have to serve as literary critics; jurisprudence would merge with aesthetics; authors and publishers would consult the legal digests for legal-artistic precedents; we would some day have a Legal Restatement of the Canons of Literary Taste.

The exception of the "classics" is therefore irrational. Consequently, it would seem that we should interpret the statute rationally — i. e., without that exception. If, however, the exception, as an exception, is irrational, then it would appear that, to render the statute valid, the standard applied to the "classics" should be applied to all books and pictures. The result would be that, in order to be constitutional, the statute must be wholly inefficacious.

3. How censorship under the statute actually operates:

(a) *Prosecutors, as censors, actually exercise prior restraint.*

Fear of punishment serves as a powerful restraint on publication, and fear of punishment often means, practically, fear of prosecution. For most men dread indictment and prosecution; the publicity alone terrifies, and to defend a criminal action is expensive. If the definition of obscenity had a limited and fairly well known scope, that fear might deter restricted sorts of publications only. But on account of the extremely vague judicial definition of the obscene,⁵¹ a person threatened with prosecution if he mails (or otherwise sends in interstate commerce)⁵² almost any book which deals in an unconventional, unorthodox, manner with sex,⁵³ may well apprehend that, should the threat be carried out, he will be punished. As a result, each prosecutor becomes a literary censor (i. e., dictator) with immense unbridled power, a virtually uncontrolled discretion.⁵⁴ A statute would be invalid which gave the Postmaster General the power, without reference to any standard, to close the mails to any publication he happened to dislike.⁵⁵ Yet, a federal prosecutor, under the federal obscenity statute, approximates that position: Within wide limits, he can (on the advice of the Postmaster General or on no one's advice) exercise such a censorship by threat, without a trial, without any judicial supervision, capriciously and arbitrarily. Having no special qualifications for that task, nevertheless, he can, in large measure, determine at his will what those within his district may not read on sexual subjects.⁵⁶ In that way, the statute brings about an actual prior restraint of free speech and free press which strikingly flouts the First Amendment.⁵⁷

(b) Judges as censors.

When a prosecution is instituted and a trial begins, much censorship power passes to the trial judge: If he sits without a jury, he must decide whether a book is obscene. If the trial is by jury, then, if he thinks the book plainly not obscene, he directs a verdict for the accused or, after a verdict of guilt, enters a judgment of acquittal. How does the judge determine whether a book is obscene? Not by way of evidence introduced at the trial, but by way of some sort of judicial notice. Whence come the judicial notice data to inform him?

Those whose views most judges know best are other lawyers. Judges can and should take judicial notice that, at many gatherings of lawyers at Bar Association or of alumni of our leading law schools,⁵⁸ tales are told fully as "obscene" as many of those distributed by men, like defendant, convicted for violation of the obscenity statute. Should not judges, then set aside such convictions? If they do not, are they not somewhat arrogantly concluding that lawyers are an exempt elite, unharmed by what will harm the multitude of other Americans? If lawyers are not such an elite then, since, in spite of the "obscene" tales lawyers frequently tell one another, data are lacking that lawyers as a group become singularly addicted to depraved sexual conduct, should not judges conclude that "obscenity"

does not importantly contribute to such misconduct, and that therefore the statute is unconstitutional?

(c) Jurors as censors.

If in a jury case, the trial judge does not direct a verdict or enter a judgment of acquittal, the jury exercises the censorship power. Courts have said that a jury has a peculiar aptitude as a censor of obscenity, since, representing a cross-section of the community, it knows peculiarly well the "common conscience" of the time. Yet no statistician would conceivably accept the views of a jury — twelve persons chosen at random — as a fair sample of community attitudes on such a subject as obscenity. A particular jury may voice the "moral sentiments" of a generation ago, not of the present time.

Each jury verdict in an obscenity case has been sagely called "really a small bit of legislation ad hoc".⁵⁹ So each jury constitutes a tiny autonomous legislature. Any one such tiny legislature, as experience teaches, may well differ from any other, in thus legislating as to obscenity. And, one may ask, was it the purpose of the First Amendment, to authorize hundreds of divers jury-legislatures, with discrepant beliefs, to decide whether or not to enact hundreds of divers statutes interfering with freedom of expression? (I shall note, *infra*, the vast difference between the applications by juries of the "reasonable man" standard and the "obscenity" standard.)

4. The dangerously infectious nature of governmental censorship of books

Governmental control of ideas or personal preferences is alien to a democracy. And the yearning to use governmental censorship of any kind is infectious. It may spread insidiously. Commencing with suppression of books as obscene, it is not unlikely to develop into official lust for the power of thought-control in the areas of religion, politics, and elsewhere. Milton observed that "licensing of books * * * necessarily pulls along with it so many other kinds of licensing." J. S. Mill noted that the "bounds of what may be called moral police" may easily extend "until it encroaches on the most unquestionably legitimate liberty of the individual." We should beware of a recrudescence of the undemocratic doctrine uttered in the 17th century by Berkeley, Governor of Virginia: "Thank God there are no free schools or preaching, for learning has brought disobedience into the world, and printing has divulged them. God keep us from both."

Plato, who detested democracy, proposed to banish all poets; and his rulers were to serve as "guardians" of the people, telling lies for the people's good, vigorously suppressing writings these guardians thought dangerous.⁶⁰ Governmental guardianship is repugnant to the basic tenet of our democracy: According to our ideals, our adult citizens are self-

guardians, to act as their own fathers, and thus become self-dependent.⁶¹ When our governmental officials act towards our citizens on the thesis that "Papa knows best what's good for you," they enervate the spirit of the citizens: To treat grown men like infants is to make them infantile, dependent, immature.

So have sagacious men often insisted. Milton, in his *Areopagitica*, denounced such paternalism: "We censure them for a giddy, vicious and unguided people, in such sick and weak (a) state of faith and discretion as to be able to take down nothing but through the pipe of a licenser." "We both consider the people as our children," wrote Jefferson to Dupont de Nemours, "but you love them as infants whom you are afraid to trust without nurses, and I as adults whom I freely leave to self-government." Tocqueville sagely remarked: "No form or combination of social policy has yet been devised to make an energetic people of a community of pusillanimous and enfeebled citizens." "Man," warned Goethe, "is easily accustomed to slavery and learns quickly to be obedient when his freedom is taken from him." Said Carl Becker, "Self-government, and the spirit of freedom that sustains it, can be maintained only if the people have sufficient intelligence and honesty to maintain them with a minimum of legal compulsion. This heavy responsibility is the price of freedom."⁶² The "great art," according to Milton, "lies to discern in what the law is to bid restraint and punishment, and in what things persuasion only is to work." So we come back, once more, to Jefferson's advice: The only completely democratic way to control publications which arouse mere thoughts or feelings is through non-governmental censorship by public opinion.

5. The seeming paradox of the First Amendment.

Here we encounter an apparent paradox: The First Amendment, judicially enforced, curbs public opinion when translated into a statute which restricts freedom of expression (except that which will probably induce undesirable conduct). The paradox is unreal: *The Amendment ensures that public opinion — the "common conscience of the time" — shall not commit suicide through legislation which chokes off today the free expression of minority views which may become the majority public opinion of tomorrow.*

The First Amendment obviously has nothing to do with the way persons or groups, not a part of government, influence public opinion as to what constitutes "decency" or "obscenity." The Catholic Church, for example, has a constitutional right to persuade or instruct its adherents not to read designated books or kinds of books.

6. The fine arts are within the First Amendment's protection.

"The framers of the First Amendment," writes Chafee, "must have had literature and art in mind, because our first national statement on the subject of 'freedom of the press,' the 1774 address of the Continental Congress to the inhabitants of Quebec, declared, 'The importance of this (freedom of the press) consists, beside the advancement of truth, science, morality and *arts* in general, in its diffusion of liberal sentiments on the administration of government.'" ⁶³ 165 years later, President Franklin Roosevelt said, "The arts cannot thrive except where men are free to be themselves and to be in charge of the discipline of their own energies and ardors. The conditions for democracy and for art are one and the same. What we call liberty in politics results in freedom of the arts." ⁶⁴ The converse is also true.

In our industrial era when, perforce, economic pursuits must be, increasingly, governmentally regulated, it is especially important that the realm of art — the noneconomic realm — should remain free, unregimented, the domain of free enterprise, of unhampered competition at its maximum. ⁶⁵ An individual's taste is his own, private, concern. *De gustibus non disputandum* represents a valued democratic maxim.

Milton wrote: "For though a licenser should happen to be judicious more than the ordinary, yet his very office * * * enjoins him to let pass nothing but what is vulgarly received already." He asked, "What a fine conformity would it starch us all into? * * * We may fall * * into a gross conformity stupidly * * " In 1859, J. S. Mill, in his essay on Liberty, maintained that conformity in taste is not a virtue but a vice. "The danger," he wrote, "is not the excess but the deficiency of personal impulses and preferences. By dint of not following their own nature (men) have no nature to follow * * * Individual spontaneity is entitled to free exercise * * * That so few men dare to be eccentric marks the chief danger of the time." Pressed by the demand for conformity, a people degenerate into "the deep slumber of a decided opinion," yield a "dull and torpid consent" to the accustomed. "Mental despotism" ensues. For "whatever crushes individuality is despotism by whatever name it be called * * * It is not by wearing down into uniformity all that is individual in themselves, but by cultivating it, and calling it forth, within the limits imposed by the rights and interests of others, that human beings become a noble and beautiful object of contemplation; and as the works partake the character of those who do them, by the same process human life also becomes rich, diversified, and animating * * * In proportion to the development of his individuality, each person becomes more valuable to himself, and is therefore capable of being more valuable to others. There is a greater fullness of life about his own existence, and when there is more life in the units there is more in the mass which is composed of them."

To vest a few fallible men — prosecutors, judges, jurors — with vast powers of literary or artistic censorship, to convert them into what J. S. Mill called a "moral police," is to make them despotic arbiters of literary products. If one day they ban mediocre books as obscene, another day they may do likewise to a work of genius. Originality, not too plentiful, should be cherished, not stifled. An author's imagination may be cramped if he must write with one eye on prosecutors or juries; authors must cope with publishers who, fearful about the judgments of governmental censors, may refuse to accept the manuscripts of contemporary Shelleys or Mark Twains or Whitmans.⁶⁶

Some few men stubbornly fight for the right to write or publish or distribute books which the great majority at the time consider loathsome. If we jail those few, the community may appear to have suffered nothing. The appearance is deceptive. For the conviction and punishment of these few will terrify writers who are more sensitive, less eager for a fight. What, as a result, they do not write might have been major literary contributions.⁶⁷ "Suppression," Spinoza said, "is paring down the state till it is too small to harbor men of talent."

7. The motive or intention of the author, publisher or distributor cannot be the test.

Some courts once held that the motive or intention of the author, painter, publisher or distributor constituted the test of obscenity. That test, the courts have abandoned: That a man who mails a book or picture believes it entirely "pure" is no defense if the court finds it obscene. *United States v. One Book Entitled Ulysses*, 2 Cir., 72 F.2d 705, 708.⁶⁸ Nor, conversely, will he be criminally liable for mailing a "pure" publication — Stevenson's *Child's Garden of Verses* or a simple photograph of the Washington Monument — he mistakenly believes obscene. Most courts now look to the "objective" intention, which can only mean the effect on those who read the book or see the picture;⁶⁹ the motive of the mailer is irrelevant because it cannot affect that effect.

8. Judge Bok's decision as to the causal relation to anti-social conduct.

In *Commonwealth v. Gordon*, 1949, 66 Pa. Dist. & Co. R. 101, Judge Bok said: "A book, however sexually impure and pornographic * * * cannot be a present danger unless its reader closes it, lays it aside, and transmutes its erotic allurements into overt action. That such action must inevitably follow as a direct consequence of reading the book does not bear analysis, nor is it borne out by general human experience; too much can intervene and too many diversions take place * * * The only clear and present danger * * * that will satisfy * * * the Constitution * * * is the commission or the imminence of the commission of criminal behavior resulting from the reading of a book. Publication alone can have no such automatic

effect." The constitutional operation of "the statute," Judge Bok continued, thus "rests on narrow ground * * * I hold that (the statute) may constitutionally be applied * * * only where there is a reasonable and demonstrable cause to believe that a crime or misdemeanor has been committed or is about to be committed as the perceptible result of the publication and distribution of the writing in question: the opinion of anyone that a tendency thereto exists or that such a result is self-evident is insufficient and irrelevant. The causal connection between the book and the criminal behavior must appear beyond a reasonable doubt."

I confess that I incline to agree with Judge Bok's opinion. But I think it should be modified in a few respects: (a) Because of the Supreme Court's opinion in the Dennis case, 1951, 341 U.S. 494, 71 S. Ct. 857, 95 L. Ed. 1137, decided since Judge Bok wrote, I would stress the element of probability in speaking of a "clear danger." (b) I think the danger need not be that of probably inducing behavior which has already been made criminal at common law or by statute, but rather of probably inducing any seriously anti-social conduct (i. e., conduct which, by statute, could validly be made a state or federal crime). (c) I think that the causal relation need not be between such anti-social conduct and a particular book involved in the case on trial, but rather between such conduct and a book of the kind or type involved in the case.⁷⁰

9. The void-for-vagueness argument.

There is another reason for doubting the constitutionality of the obscenity statute. The exquisite vagueness of the word "obscenity" is apparent from the way the judicial definition of that word has kept shifting: Once (as we saw) the courts held a work obscene if it would probably stimulate improper thoughts or desires in abnormal persons; now most courts consider only the assumed impact on the thoughts or desires of the adult "normal" or average human being. A standard so difficult for our ablest judges to interpret is hardly one which has a "well-settled" meaning, a meaning sufficient adequately to advise a man whether he is or is not committing a crime if he mails a book or picture. See, e. g., *International Harvester Co. of America v. Commonwealth of Kentucky*, 234 U.S. 216, 34 S. Ct. 853, 58 L. Ed. 1284; *United States v. L. Cohen Grocery Co.*, 255 U.S. 81, 41 S. Ct. 298, 65 L. Ed. 516; *Connally v. General Construction Co.*, 269 U.S. 385, 46 S. Ct. 126, 70 L. Ed. 322; *Cline v. Frink Dairy Co.*, 274 U.S. 445, 47 S. Ct. 681, 71 L. Ed. 1146; *Champlin Refining Co. v. Corporation Commission*, 286 U.S. 210, 52 S. Ct. 559, 76 L. Ed. 1062; *Lanzetta v. State of New Jersey*, 306 U.S. 451, 59 S. Ct. 618, 83 L. Ed. 888; *Musser v. State of Utah*, 333 U.S. 95, 68 S. Ct. 397, 92 L. Ed. 562; *Winters v. People of State of New York*, 333 U.S. 507, 68 S. Ct. 665, 92 L. Ed. 840; cf. *United States v. Cardiff*, 344 U.S. 174, 73 S. Ct. 189, 97 L. Ed. 200.

If we accept as correct the generally current judicial standard of obscenity — the "average conscience of the time" — that standard still remains markedly uncertain as a guide to judges or jurors — and therefore to a citizen who contemplates mailing a book or picture. To be sure, we trust juries to use their common sense in applying the "reasonable man" standard in prosecutions for criminal negligence (or the like); a man has to take his chances on a jury verdict in such a case, with no certainty that a jury will not convict him although another jury may acquit another man on the same evidence.⁷¹ But that standard has nothing remotely resembling the looseness of the "obscenity" standard.

There is a stronger argument against the analogy of the "reasonable man" test: Even if the obscenity standard would have sufficient definiteness were freedom of expression not involved, it would seem far too vague to justify as a basis for an exception to the First Amendment. See *Stromberg v. People of State of California*, 283 U.S. 359, 51 S. Ct. 532, 75 L. Ed. 1117; *Herndon v. Lowry*, 301 U.S. 242, 57 S. Ct. 732, 81 L. Ed. 1066; *Winters v. People of State of New York*, 333 U.S. 507, 68 S. Ct. 665, 92 L. Ed. 840; *Kunz v. People of State of New York*, 340 U.S. 290, 71 S. Ct. 312, 95 L. Ed. 280; *Burstyn, Inc., v. Wilson*, 343 U.S. 495, 72 S. Ct. 777, 96 L. Ed. 1098; *Callings, Constitutional Uncertainty*, 40 Cornell L.Q. (1955) 194, 214-218.

In *United States v. Rebhuhn*, 2 Cir., 109 F.2d 512, 514, the court tersely rejected the contention that the obscenity statute is too vague, citing and relying on *Rosen v. United States*, 161 U.S. 29, 16 S. Ct. 434, 480, 40 L. Ed. 606. However the *Rosen* case did not deal with that subject but merely with the sufficiency of the wording of an indictment under that statute.

WATERMAN, Circuit Judge (concurring).

I concur with my colleagues in affirming the judgment below. I would dispose in one sentence of the claim advanced that the applicable statute, 18 U.S.C.A. § 1461, is unconstitutional, for I believe the constitutionality of such legislation is so well settled that: "If the question is to be reopened the Supreme Court must open it. *Tyomies Publishing Company v. United States*, 6 Cir., 211 F. 385" — quoting Learned Hand, C. J., in *United States v. Rebhuhn*, 2 Cir., 1940, 109 F.2d 512, at page 514, certiorari denied 310 U.S. 629, 60 S. Ct. 976, 84 L. Ed. 1399. I concur with Chief Judge Clark in his disposition of the remaining issues.

As pointed out below, the quoted wording was somewhat expanded by Congress in 1955, after the commission of the offenses here involved

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The injunction against sale of paper-covered booklets "indisputably pornographic, indisputably obscene and filthy" — the words are Judge Fuld's, 1 N.Y.2d 177, 151 N.Y.S.2d 639, 640, 134 N.E.2d 461, 462 — was granted under a 1941 statute, N.Y. Code Cr.Proc. § 22-a, on suit of the Corporation Counsel of the City of New York. While the court was unanimous in holding the statute constitutional and the injunction proper, there were two opinions — a detailed analysis of the legal background by Judge Fuld, concurred in by two other judges, and a brief and more formal statement by Judge Desmond, concurred in by two other judges

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See, e. g., *Ex parte Jackson*, 96 U.S. 727, 24 L. Ed. 877; *Swearingen v. United States*, 161 U.S. 446, 16 S. Ct. 562, 40 L. Ed. 765; *Dunlop v. United States*, 165 U.S. 486, 17 S. Ct. 375, 41 L. Ed. 799; *Public Clearing House v. Coyne*, 194 U.S. 497, 508, 24 S. Ct. 789, 48 L. Ed. 1092; *Robertson v. Baldwin*, 165 U.S. 275, 281, 17 S. Ct. 326, 41 L. Ed. 715; *Near v. State of Minnesota ex rel. Olson*, 283 U.S. 697, 716, 51 S. Ct. 625, 75 L. Ed. 1357; *Chaplinsky v. State of New Hampshire*, 315 U.S. 568, 571-572, 62 S. Ct. 766, 86 L. Ed. 1031; *Beauharnais v. People of State of Illinois*, 343 U.S. 250, 266, 72 S. Ct. 725, 96 L. Ed. 919; *Schindler v. United States*, 9 Cir., 221 F.2d 743, certiorari denied 350 U.S. 938, 76 S. Ct. 310; *United States v. Hornick*, 3 Cir., 229 F.2d 120, affirming D.C.E.D. Pa., 131 F. Supp. 603; *Roth v. Goldman*, 2 Cir., 172 F.2d 788, certiorari denied 337 U.S. 938, 69 S. Ct. 1514, 93 L. Ed. 1743

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See Fuld, J., in *Brown v. Kingsley Books, Inc.*, 1 N.Y.2d 177, 151 N.Y.S.2d 639, 641, note 3, 134 N.E.2d 461, 463: "It is noteworthy that studies are for the first time being made, through such scientific skills as exist, concerning the impact of the obscene, in writings and other mass media, on the mind and behavior of men, women and children. (See, e. g., *Jahoda and Staff of Research Center for Human Relations, New York University* [1954], *The Impact of Literature: A Psychological Discussion of Some Assumptions in the Censorship Debate.*)"

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Sen.Rep. No. 113, 84th Cong., 1st Sess., supporting the 1955 amendment to § 1461 discussed below, has this to say: "The subcommittee of the Committee on the Judiciary investigating juvenile delinquency in the United States reports that the nationwide traffic in obscene matter is increasing year by year and that a large part of that traffic is being channeled into the hands of children. That subcommittee recommended implementation of

the present statute so as to prevent the using of the mails in the trafficking of all obscene matter. The passage of S. 600 will contribute greatly in the continuing struggle to combat juvenile delinquency and the corruption of public morals." 2 U.S.Code Cong. & Adm.News 1955, p. 2211

See also Chief Justice Vanderbilt, *Impasses in Justice*, [1956] Wash. U. L.Q. 267, 302: "(4) Our greatest concern with the oncoming generation, I submit, relates to the perversion of young minds through the mass media of the movies, television, radio, and the press, especially so-called comics. Wertham, *Seduction of the Innocent* (1954). See also Feder, *Comic Book Regulation* (Univ. of Calif. Bureau of Pub. Admin. 1955). The problem is only beginning to receive the consideration its seriousness calls for. Here is a field in which the law schools are well equipped to furnish leadership in a controversy where rare discrimination and courage are required."

Perhaps scholarly research may suggest better statutes than we have; but it is doubtful if help can be found in such suggestions as for the inclusion in legislation of the enticing invitation, "For Adults Only." Cf. Ernst & Seagle, *To the Pure* 277 (1928).

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And by Judge Fuld and his colleagues; see *supra* note 2

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It also eliminated the former fifth paragraph now superfluous. See the Senate Report cited *supra* note 5

He said: "The test is not whether it would arouse sexual desires or sexually impure thoughts in those comprising a particular segment of the community, the young, the immature or the highly prudish. * * * In other words, you must determine its impact upon the average person in the community."

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The statute condemns the mailing not only of "obscene" matter but also of "filthy" matter. Parts of the indictment here charged the defendant with mailing "filthy" publications. The trial judge told the jury they could convict the defendant for mailing a "filthy" publication, if they found that it treated "sexual matters in such a vulgar and indecent way so that it tends to arouse a feeling of disgust or aversion." The following contention might be urged: The very argument advanced to sustain the statute's validity, so far as it condemns the obscene, goes to show the invalidity of the statute so far as it condemns "filth," if "filth"

means that which renders sexual desires "disgusting." For if the argument be sound that the legislature may constitutionally provide punishment for the obscene because, antisocially, it arouses sexual desires by making sex attractive, then it follows that whatever makes sex disgusting is socially beneficial — and thus not the subject of valid legislation which punishes the mailing of "filthy" matter. To avoid this seeming inconsistency, the statute should be interpreted as follows: The mailing of a "filthy" matter is a crime if that matter tends to induce acts by the recipient which will probably tend to cause breaches of the peace. This interpretation is in line with *United States v. Limehouse*, 285 U.S. 424, 52 S. Ct. 412, 76 L. Ed. 843. There the Court affirmed the conviction of a defendant who had mailed letters to divers persons which, in "foul language," accused them of sexual immorality. Those letters thus were within the category of "fighting words" — i. e., insulting words or the like — which may constitutionally be made criminal precisely because they tend to provoke breaches of the peace. Where, however, "filthy" language appears in a book, or picture, and involves no insults to particular persons, there will be no such consequences.

If this were the correct interpretation of "filthy," then that part of the statute condemning the "filthy" would not apply to the acts of the defendant here, and the judge's instructions re "filthy" would have been erroneous.

But I think we need not here consider that interpretation since I agree with my colleagues that, for the reasons they state, assuming there was error, the defendant's deliberate acquiescence in the judge's instructions prevents him from now so asserting.

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"For nearly 130 years after its adoption, the First Amendment received scant attention from the Supreme Court"; Emerson, *The Doctrine of Prior Restraint*, 20 L. & Cont.Problems (1955) 648, 652

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See, e. g., *Chaplinsky v. State of New Hampshire*, 315 U.S. 568, 572, 62 S. Ct. 766, 86 L. Ed. 1031

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The judicial enforcement of some private rights — as in suits, e. g., for defamation, injury to business, fraud, or invasion of privacy — comes within the exception

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Lockhart and McClure, *Obscenity and the Constitution*, 38 Minn. L. Rev. (1954) 295, 357; cf. Kalven, *The Law of Defamation and the First Amendment*, in (University of Chicago) Conference on the Arts, Publishing and the Law (1952) 3, 12

Chafee, *The Blessings of Liberty* (1956) 69

Judge Cuthbert Pound dissenting in *People v. Gitlow*, 234 N.Y. 132, 158, 136 N.E. 317, 327

The Appendix contains a discussion of the writings of those described by Judge Clark as persons "with competence in the premises". It tries to show (1) that the overwhelming majority of persons with such competence assert that there is no justification for the thesis that a demonstrable causal relation exists between reading or seeing the obscene and anti-social conduct, even of children, and (2) that the chief proponent of the opposite view with respect to the effect on children's conduct does not maintain the same as to adult conduct

Public opinion, by influencing social attitudes, may create a convention, with no governmental "sanction" behind it, far more coercive than any statute. Cf. Holmes, *Codes and The Arrangement of the Law*, 2 Am.L.Rev. (1870) 4, 5
Notably is this true of conventions as to obscenity; La Barre, *Obscenity: An Anthropological Appraisal*, 20 L. & Con. Problems (1955) 533.

The results of the pressure of current public opinion may not always be happy. But our democracy accepts the postulate that, in the long run, the struggle to sway public opinion will produce the wisest policies. For further discussion of this theme, see the Appendix

The Child Labor Tax Case, *Bailey v. Drexel Furniture Co.*, 259 U.S. 20, 37, 42 S. Ct. 449, 450, 66 L. Ed. 817

See Van Doren, *Benjamin Franklin* (1938) 150-151, 153-154
Franklin's *Letter to The Academy of Brussels* (see Van Doren, 151-152) might be considered "filthy."

2
18 U.S.C. § 1461

3
Jefferson, Notes on the State of Virginia 1781-1785), Query VI; See Padover, The Complete Jefferson (1943) 567 at 612

4
Jefferson, Autobiography (1821); See Padover, loc. cit., 1119 at 1193

5
Jefferson, Anecdotes of Franklin (1818); see Padover, loc. cit., 892 at 893
5a. On Franklin's death, Madison offered the following resolution which the House of Representatives unanimously adopted: "The House being informed of the decease of Benjamin Franklin, a citizen whose genius was not more of an ornament of human nature than his various exertions of it have been to science, to freedom and to his country, do resolve, as a mark of veneration due to his memory, that the members wear the customary badge of mourning for one month." Brant, James Madison, Father of the Constitution (1950) 309; Annals, April 22, 1790.

6
Padover, The Complete Madison (1953) 8-9
George Washington, who knew Franklin well, treasured a gold-headed cane given him by Franklin. See Padover, The Washington Papers (1955) 112.

See Judge Bok, in Commonwealth v. Gordon, 66 Pa. Dist. & Co. R. 101, 120-121: "One need only recall that the father of the post office, Benjamin Franklin, wrote and presumably mailed his letter of Advice to Young Men on the Proper Choosing of a Mistress; * * * that Alexander Hamilton's adultery while holding public office created no great scandal * * *"

7
Ernst and Seagle, To The Pure (1928) 108
Everyone interested in obscenity legislation owes a deep debt to many writings on the subject by Morris Ernst. For such an acknowledgment, see Acknowledgments in Blanshard, The Right to Read (1955).

8

See Padover, *The Complete Madison* (1953) 295-296

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Madison referred to the "Third Amendment," but the context shows he meant the First

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See Padover, *The Complete Madison* (1953) 267, 268-269

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Padover, *The Complete Jefferson* (1943) 109

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Madison, Address to the General Assembly of Virginia, 1799; see Padover, *The Complete Madison* (1953) 295

.3

See Padover, *The Complete Jefferson* (1943) 130

.4

See Padover, *The Complete Jefferson* (1943) 889

.5

Jefferson's Letter to Madison (1789); Padover, *The Complete Jefferson* (1943) 123-125.
See also Brant, *James Madison, Father of the Constitution* (1950) 267

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The Federalist No. 84; Cahn, *The Firstness of the First Amendment*, 65 *Yale L.J.* (1956) 464

.7

Madison, *Writings* (Hunt ed.) V, 385; Corwin, *Liberty Against Government* (1948) 58-59;
Cahn, *The Firstness of the First Amendment*, 64 *Yale L.J.* (1956) 464, 468

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Wingfield-Stratford, *Those Earnest Victorians* (1930) 151

.9

See Kaplan, *Obscenity as an Esthetic Category*, 20 *Law & Contemp. Problems* (1955) 544, 550: "In many cultures, obscenity has an important part in magical rituals. In our own, its

magical character is betrayed in the puritan's supposition that words alone can work evil, and that evil will be averted if only the words are not uttered."

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Wingfield-Stratford, loc. cit., 296-297

!1

Paradoxically, this attitude apparently tends to "create" obscenity. For the foundation of obscenity seems to be secrecy and shame: "The secret becomes shameful because of its secrecy." Kaplan, *Obscenity As An Esthetic Category*, 20 *Law & Contemp. Problems* (1955) 544, 556

!2

To be sure, every society has "pretend-rules" (moral and legal) which it publicly voices but does not enforce. Indeed, a gap necessarily exists between a society's ideals, if at all exalted, and its practices. But the extent of the gap is significant. See, e. g., Frank, *Lawlessness*, *Encyc. of Soc. Sciences* (1932); cf. Frank, *Preface to Kahn, A Court for Children* (1953)

!3

It is of interest that not until the Tariff Act of 1824 did Congress enact any legislation relative to obscenity

!4

For discussion of the suggestion that many constitutional provisions provide merely minimum safeguards which may properly be enlarged — not diminished — to meet newly emerging needs and policies, see Supreme Court and Supreme Law (Cahn ed. 1954) 59-64 24a. In *Bridges v. State of California*, 314 U.S. 252, 264-265, 62 S. Ct. 190, 194, the Court said: "In any event it need not detain us, for to assume that English common law in this field became ours is to deny the generally accepted historical belief that `one of the objects of the Revolution was to get rid of the English common law on liberty of speech and of the press.' Schofield, *Freedom of the Press in the United States*, 9 *Publications Amer.Sociol.Soc.*, 67, 76. More specifically, it is to forget the environment in which the First Amendment was ratified. In presenting the proposals which were later embodied in the Bill of Rights, James Madison, the leader in the preparation of the First Amendment said: `Although I know whenever the great rights, the trial by jury, freedom of the press, or liberty of conscience, come in question in that body (Parliament), the invasion of them is resisted by able advocates, yet their Magna Charta does not contain any one provision for the security of those rights, respecting which the people of America are most alarmed. The freedom of the

press and rights of conscience, those choicest privileges of the people, are unguarded in the British Constitution.' 1 Annals of Congress 1789-1790, 434. And Madison elsewhere wrote that 'the state of the press * * * under the common law, cannot * * * be the standard of its freedom in the United States.' VI Writings of James Madison 1790-1802, 387. There are no contrary implications in any part of the history of the period in which the First Amendment was framed and adopted. No purpose in ratifying the Bill of Rights was clearer than that of securing for the people of the United States much greater freedom of religion, expression, assembly, and petition than the people of Great Britain had ever enjoyed. It cannot be denied, for example, that the religious test oath or the restrictions upon assembly then prevalent in England would have been regarded as measures which the Constitution prohibited the American Congress from passing. And since the same unequivocal language is used with respect to freedom of the press, it signifies a similar enlargement of that concept as well. Ratified as it was while the memory of many oppressive English restrictions on the enumerated liberties was still fresh, the First Amendment cannot reasonably be taken as approving prevalent English Practices. On the contrary, the only conclusion supported by history is that the unqualified prohibitions laid down by the framers were intended to give to liberty of the press, as to the other liberties, the broadest scope that could be countenanced in an orderly society."

In *Grosjean v. American Press Co.*, 297 U.S. 233, 248-249, 56 S. Ct. 444, 448, 80 L. Ed. 660, the Court said: "It is impossible to concede that by the words 'freedom of the press' the framers of the amendment intended to adopt merely the narrow view then reflected by the law of England that such freedom consisted only in immunity from previous censorship; for this abuse had then permanently disappeared from English practice. * * * Undoubtedly, the range of a constitutional provision phrased in terms of the common law sometimes may be fixed by recourse to the applicable rules of that law. But the doctrine which justifies such recourse, like other canons of construction, must yield to more compelling reasons whenever they exist. Cf. *Continental Illinois Nat. Bank & Trust Co. of Chicago v. Chicago, R. I. & P. Ry. Co.*, 294 U.S. 648, 668-669, 55 S. Ct. 595, 79 L. Ed. 1110. And, obviously, it is subject to the qualification that the common-law rule invoked shall be one not rejected by our ancestors as unsuited to their civil or political conditions. *Den ex rel. Murray's Lessee v. Hoboken Land & Improvement Co.*, 18 How. 272, 276-277, 15 L. Ed. 372; *Waring v. Clarke*, 5 How. 441, 454-457, 12 L. Ed. 226; *Powell v. State of Alabama*, supra, 287 U.S. 45, at pages 60-65, 53 S. Ct. 55, 77 L. Ed. 158. In the light of all that has now been said, it is evident that the restricted rules of the English law in respect of the freedom of the press in force when the Constitution was adopted were never accepted by the American colonists * *

*,."

15

Blackstone, most influentially, made this distinction; 4 Blackstone, Commentary, 151-162. His condonation of punishment reflected the views of his patron, Lord Mansfield, who, an opponent of a free press, took an active part in punishing published criticism of the government

But men like Jefferson and James Wilson abhorred the Tory political views of Blackstone and Mansfield, both of whom had ranked high in the opposition to the American Colonists. Jefferson wrote to Madison of "the horrid Mansfieldism of Blackstone which had caused many young American lawyers to slide into Toryism." Jefferson applauded Tucker's "republicanized" edition of Blackstone published in 1803. See Frank, A Sketch of An Influence, in the volume Interpretations of Modern Legal Philosophers (1947) 189, especially 231; see also 191, 196-198, 205, 207, 210, 215-217. For James Wilson's denunciation of Blackstone's political attitudes, see, e. g., Wilson's opinion in *Chisholm v. State of Georgia*, 2 Dall. 419, 453, 458, 462, 1 L. Ed. 440.

16

See Holmes, J. in *Patterson v. State of Colorado*, 1907, 205 U.S. 454, 27 S. Ct. 556, 51 L. Ed. 879 citing Blackstone. But compare his subsequent dissenting opinion in *Abrams v. United States*, 1919, 250 U.S. 616, 624, 40 S. Ct. 17, 20, 63 L. Ed. 1173, which abandons Blackstone's dichotomy

17

For these phrases, see Lasswell, Censorship, 3 Ency. of Soc. Sc. (1930) 290, 291

18

United States v. Dennett, 2 Cir., 39 F.2d 564, 568, 76 A.L.R. 1092

19

United States v. Levine, 2 Cir., 83 F.2d 156, 158

20

Burstein v. United States, 2 Cir., 178 F.2d 665, 667

30a. *American Civil Liberties Union v. City of Chicago*, 3 Ill. 2d 334, 121 N.E.2d 585, 592.

21

Cf. the opinion of Mr. Justice Codd in *Integrated Press v. The Postmaster General*, as reported in Herbert, *Codd's Last Case* (1952) 14, 16: "Nor is the Court much impressed by the contention that the frequent contemplation of young ladies in bathing dresses must tend to the moral corruption of the community. On the contrary, these ubiquitous exhibitions

have so diminished what was left of the mystery of womanhood that they might easily be condemned upon another ground of public policy, in that they tended to destroy the natural fascination of the female, so that the attention of the male population was diverted from thoughts of marriage to cricket, darts, motor-bicycling and other occupations which do nothing to arrest the decline of the population."

12

Lockhart and McClure, *Obscenity and The Courts*, 20 L. & Contemp.P. (1955) 587, 595

13

See Alpert, *Judicial Censorship and The Press*, 52 Harv. L. Rev. (1938) 40, 72

33a. Lockhart and McClure, *Literature, The Law of Obscenity and The Constitution*, 38 Minn. L. Rev. (1954) 295, 385-386.

Perhaps some of the reasoning of this summary is a bit too sweeping. For a more cautious summary, see the Jahoda report, discussed *infra*.

33b I, for one, deplore the use of the word "scientific" as applied to social studies. See, e. g., Frank, 4 J. of Public Law (1955) 8.

14

Novick, Superintendent of the New York Training School for Girls, writes: "In the public eye today juvenile delinquency is alternately the direct result of progressive education, horror comics, T. V. programs, and other pet peeves of our present society * * * This is not a new phenomenon. Each generation of adults has been concerned about the behavior of its children and has looked for a scapegoat on which to place the blame for its delinquency. At the same time, adults have always sought a panacea which would cure the problem. It is sufficient to note that delinquency has always risen during periods of stress and strain, and the era in which we are living is no exception * * * Neither do restrictive measures such as * * * censorship of reading matter * * * prevent delinquency. They merely have an effect upon the manner in which the delinquency will be expressed." Novick, *Integrating the Delinquent and His Community*, 20 Fed.Probation, 38, 40 (1956)

Charles Lamb (whose concern with children he manifested in his *Tales From Shakespeare*) had no belief that uncensored reading harmed children: In his *Essays of Elia* he wrote of the education of his cousin Bridget, "She was tumbled early into a spacious closet of good old English reading" (which included Elizabethan and Restoration dramas and 18th century novels) "without much selection or prohibition and browsed at will upon that fair and wholesome pasturage. Had I twenty girls, they should be brought up exactly in this fashion."

Judge Curtis Bok, perhaps remembering Lamb's remarks, said of the publications before him in *Commonwealth v. Gordon*, 1949, 66 Pa.Dist. & Co.R. 101: "It will be asked whether one would care to have one's young daughter read these books. I suppose that by the time she is old enough to wish to read them she will have learned the biologic facts of life and the words that go with them. There is something seriously wrong at home if those facts have not been met and faced and sorted by then; it is not children so much as parents that should receive our concern about this. I should prefer that my own three daughters meet the facts of life and the literature of the world in my library than behind a neighbor's barn, for I can face the adversary there directly. If the young ladies are appalled by what they read, they can close the book at the bottom of page one; if they read further, they will learn what is in the world and in its people, and no parents who have been discerning with their children need fear the outcome. Nor can they hold it back, for life is a series of little battles and minor issues, and the burden of choice is on us all, every day, young and old. Our daughters must live in the world and decide what sort of women they are to be, and we should be willing to prefer their deliberate and informed choice of decency rather than an innocence that continues to spring from ignorance. If that choice be made in the open sunlight, it is more apt than when made in shadow to fall on the side of honorable behavior."

Watson writes similarly: "What innocent children most need is not a sterile environment from which all evidence of * * * lust * * * has been removed, but help in interpreting the evil which is an inescapable part of life. Home, school and church should cooperate not to create an artificial hot-house insulation for life's realities but to enable children to respond, "Ah, yes! I understand!" Most children in middle class homes alarm their parents by spells in which they overdo imaginative violence, sex talk, worry about death, listening to cowboy programs, reading inane comics, exchanging dirty stories, and most of them in time, with or without adult counsel, will work their way through to better standards of taste. Protection by censorship might leave such children weaker and more susceptible; some of these childhood interests, like measles, contribute to a later life of useful immunity." Watson, *Some Effects on Censorship upon Society*, in *5 Social Meaning of Legal Concepts* (1953) 73, 83-85.

Said Milton: "They are not skilful considerers of human things, who imagine to remove sin by removing the matter of sin." A renowned sinner declared that he "could resist everything but temptation."

connection with his statement of our judicial "lack of knowledge of the social bearing of this problem". However, his quotation from that New York opinion cites the Jahoda report, and I therefore assume that Judge Clark intended to include Dr. Jahoda among "those with competence in the premises"

36

Vanderbilt, *Impasse In Justice*, Wash. U. L.Q. (1956), 267, 302

37

Ibid

38

Such a statute was long ago suggested. See Ernst and Seagle, *To the Pure* (1928) 277

39

Cf. *United States v. Dennett*, 2 Cir., 39 F.2d 564, 568, 76 A.L.R. 1092

Alpert (*loc. cit.* at 74) writes of the American Youth Commission study of the conditions and attitudes of young people in Maryland between the ages of sixteen and twenty-four, as reported in 1938: "For this study Maryland was deliberately picked as a 'typical' state, and, according to the Commission, the 13,528 young people personally interviewed in Maryland can speak for the two hundred and fifty thousand young people in Maryland and the twenty millions in the United States. 'The chief source of sex "education" for the youth of all ages and all religious groups was found to be the youth's contemporaries.' Sixty-six percent of the boys and forty percent of the girls reported that what they knew about sex was more or less limited to what their friends of their own age had told them. After 'contemporaries' and the youth's home, the source that is next in importance is the school, from which about 8 percent of the young people reported they had received most of their sex information. A few, about 4 percent, reported they owed most to books, while less than 1 percent asserted that they had acquired most of their information from movies. Exactly the same proportion specified the church as the chief source of their sex information. These statistical results are not offered as conclusive; but that they do more than cast doubt upon the assertion that 'immoral' books, corrupt and deprave must be admitted. These statistical results placed in the scale against the weight of the dogma upon which the law is founded lift the counterpane high. Add this: that 'evil manners' are as easily acquired without books as with books; that crowded slums, machine labor, barren lives, starved emotions, and unreasoning minds are far more dangerous to morals than any so-called obscene literature. True, this attack is tangential, but a social problem is here involved, and the weight of this approach should be felt." *Id.* at 74.

10

For such a report, slightly expurgated for adult readers, see Cleckley, *The Mask of Sanity* (1950) 135-137

11

Cf. Larrabee, *The Cultural Context of Sex Censorship*, 20 *L. & Contemp.Prob.* (1955) 672, 684

12

Myerson, *Speaking of Man* (1950) 92. See also the well known chapter on clothes in Anatole France's *Penguin Island*

Dr. Wertham discussing "comic books," makes much of the advertisements they carry. He speaks of their "breast ads," and also of their playing up of "glamour girls," their stress on the "sexy," their emphasis on women's "secondary sexual characteristics." Is not this also descriptive of the advertisements in our "best periodicals"?

42a. It is arguable that the fact that a publication is regarded by the reader as "pornography" influences its impact on him. No relevant reliable data, however, is available.

42b. "No one would dare ask of a newspaper that it observe the same restraints that are constantly being demanded of * * * the comic book." Larrabee, *The Cultural Context of Sex Censorship*, 20 *Law and Contemp.Problems* (1955) 673, 679.

13

See *United States v. Levine*, 2 Cir., 83 F.2d 156, 157 to the effect that "what counts is its effect, not upon any particular class, but upon all those whom it is likely to reach."

43a. Congress has made no such finding. There is none such in the Senate Report (supporting the 1955 amendment of Section 1461) quoted by Judge Clark in his footnote 5.

14

Cf. *United States v. Rumely*, 345 U.S. 41, 44, 73 S. Ct. 543, 97 L. Ed. 770

15

See, e. g., Vol. 17, p. 36, Plate 3, No. 4, reproducing Botticelli's "Birth of Venus"; p. 38, Plate VIII, No. 2, reproducing Titian's "Woman on a Couch"; Vol. 20, p. 202, Plate V, No. 8, reproducing Clodion's "Nymph and Satyr"; p. 204, Plate VI, reproducing Rodin's "The Kiss."

See *Parmelee v. United States*, 72 App. D.C. 203, 113 F.2d 729, 734 and note 19.

16

See, e. g., Masterpieces of Painting From The National Gallery of Art (Cairns and Walker ed. 1944) 68, 72, 114; Catalogue of Pictures Collected by Yale Alumni (1956) 3, 15, 55, 134, 137, 195

17

See, e. g., United States v. Levine, 2 Cir., 83 F.2d 156, 157; United States v. One Book Entitled Ulysses, 2 Cir., 72 F.2d 705; Roth v. Goldman, 2 Cir., 172 F.2d 788

18

See Roth v. Goldman, 2 Cir., 172 F.2d 788

No one can argue with a straight face (1) that reading an obscene "classic" in a library has less harmful effects or (2) that, as the "classics" often are published in expensive volumes, they usually affect only persons who have large incomes, and that such persons' right to read is peculiarly privileged.

19

See discussion in Roth v. Goldman, 2 Cir., 172 F.2d at page 797

20

The importation statute relating to obscenity, 19 U.S.C.A. § 1305, does make an explicit exception of the "so-called classics or books of recognized and established literary * * * merit," but only if they are "imported for noncommercial purposes"; if so, the Secretary of the Treasury has discretion to admit them

21

See *infra*, point 9, for further discussion of that vagueness

22

As to interstate transportation, see 18 U.S.C. § 1462 which contains substantially the same provisions as 18 U.S.C. § 1461

23

See Kaplan, Obscenity as An Esthetic Category, 20 Law & Contemp.Problems (1955) 544, 551-552 as to "conventional obscenity," which he defines as "the quality of any work which attacks sexual patterns and practices. In essence, it is the presentation of a sexual heterodoxy, a rejection of accepted standards of sexual behavior. Zola, Ibsen and Shaw

provide familiar examples. It surprises no one that the author of *Nana* also wrote *J'Accuse*; of *Ghosts*, *An Enemy of the People*; of *Mrs. Warren's Profession*, *Saint Joan*."

See also, Lockhart and McClure, *Obscenity in the Courts*, 20 *Law & Contemp. Problems* (1955) 586, 596-597 as to "ideological obscenity"; they note that the courts have generally refrained (at least explicitly) from basing their decisions on rulings that literally may be prescribed to guard against a change in accepted moral standards, "because any such ruling would fly squarely in the face of the very purpose for guaranteeing freedom of expression and would thus raise serious constitutional questions."

;4

One court, at the suit of a publisher, enjoined a chief of police — who went beyond threat of prosecution and ordered booksellers not to sell certain books — on the ground that the officer had exceeded his powers; *New American Library of World Literature v. Allen*, D.C. Ohio, 114 F. Supp. 823. In another similar case, where a prosecutor was enjoined, the injunction order was much modified on appeal; *Bantam Books, Inc., v. Melko*, 25 N.J. Super. 292, 96 A.2d 47, modified 14 N.J. 524, 103 A.2d 256

If, however, the prosecutor confines himself to a mere threat of prosecution, the traditional reluctance to restrain criminal prosecutions will very probably make it difficult to obtain such an injunction. *Sunshine Book Co. v. McCaffrey*, Sup., 112 N.Y.S.2d 476; see also 22 *U. of Chicago L.Rev.* (1954) 216; 68 *Harv. L. Rev.* (1955) 489.

This may be particularly true with respect to a federal prosecutor. See Mr. Justice Jackson, *The Federal Prosecutor*, 24 *J. of Am.Jud.Soc.* (1940) 18: "The (federal) prosecutor has more control over life, liberty, and reputation than any other person in America. His discretion is tremendous. He can have citizens investigated and, if he is that kind of person, he can have this done to the tune of public statements and veiled or unveiled intimations. Or the prosecutor may choose a more subtle course and simply have a citizen's friends interviewed. The prosecutor can order arrests, present cases to the grand jury in secret session, and on the basis of his one-sided presentation of the facts, can cause the citizen to be indicted and held for trial. He may dismiss the case before trial, in which case the defense never has a chance to be heard."

;5

See, e. g., *Joseph Burstyn, Inc., v. Wilson*, 343 U.S. 495, 72 S. Ct. 777, 96 L. Ed. 1098

;6

It is, therefore, doubtful whether, as suggested by Emerson (loc. cit. at 656-660), a statute calling for punishment involves very much less arbitrary conduct and very much less censorship than one calling for prior restraint. In actual fact, by his threats of prosecution, the prosecutor does exercise prior restraint. Much, therefore, that Emerson says of prior restraint authorized by statute applies as well as to censorship through a prosecutor's threats of prosecution: The "procedural safeguards built around criminal prosecution" (the stronger burden of proof, the stricter rules of evidence, the tighter procedure) are likewise absent. The "decision rests with a single functionary," an official, rather than with the courts. The prosecutor, by threats of prosecution, accomplishes prior restraint "behind a screen of informality and partial concealment that seriously curtails opportunity for public appraisal" and entailing the "chance of discrimination and other abuse." The "policies and actions" of the prosecutor, in his censorship by threats of prosecution, are not "likely to be known or publicly debated; material and study and criticism" are not "readily available."

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7

For startling instances of "prosecutor censorship" see Blanshard, *The Right to Read* (1955) 184-186, 190; 22 U. of Chicago L.Rev. (1954) 216

;
8

See *Roth v. Goldman*, 2 Cir., 172 F.2d 788, at page 796 (concurring opinion):

"One thinks of the lyrics sung at many such gatherings by a certain respected and conservative member of the faculty of a great law-school which considers itself the most distinguished and which is the Alma Mater of many judges sitting on upper courts."

Aubrey's Lives, containing many "salacious" tales, delights some of our greatest judges.

Mr. Justice Holmes was a constant reader of "naughty French novels." See Bent, *Justice O. W. Holmes* (1932) 16, 134.

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9

United States v. Levine, 2 Cir., 83 F.2d 156, 157

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Plato furnished "an ideal blueprint for a totalitarian society"; Chroust, *Book Rev.*, 1 *Natural Law Forum* (1956) 135, 141. See also Popper, *The Open Society and Its Enemies* (1950); Frank, *Courts on Trial* (1949) 146-147, 158, 350, 360, 405-406; Frank, *Fate and Freedom* (1949) 119, 319, note 25, 365, note 10; Frank, *If Men Were Angels* (1942) 192; Fite, *The Platonic Legend* (1934); Catlin, *The Story of the Political Philosophers* (1939) 52, 58, 65-66;

Kallen, Ethical Aspects of Censorship, in Protection of Public Morals Through Censorship (1953) 34, 53-54

51

See Frank, Self Guardianship and Democracy, 16 Am.Scholar (1947) 265

52

Becker, Freedom and Responsibility in the American Way of Life (1945) 42

53

Chafee, Government and Mass Communication (1947) 53

54

Message at dedicating exercises of the New York Museum of Modern Art, May 8, 1939

55

Frank, Fate and Freedom (1945) 194-202

56

Milton remarked that "not to count him fit to print his mind without a tutor or examiner, lest he should drop * * * something of corruption, is the greatest * * * indignity to a free and knowing spirit that can be put upon him."

57

Cf. Chafee, The Blessings of Liberty (1956) 113

58

Rosen v. United States, 161 U.S. 29, 41-42, 16 S. Ct. 434, 480, 40 L. Ed. 606

Milton said that the "sense" of a great man may "to all posterity be lost for the fearfulness, or the presumptuous rashness of a perfunctory licenser."

59

United States v. Levine, 2 Cir., 83 F.2d 156; Parmelee v. United States, 72 App. D.C. 203, 113 F.2d 729

70

According to Judge Bok, an obscenity statute may be validly enforced when there is proof of a causal relation between a particular book and undesirable conduct. Almost surely, such proof cannot ever be adduced. In the instant case, the government did not offer such proof

'1

Nash v. United States, 229 U.S. 373, 377, 33 S. Ct. 780, 57 L. Ed. 1232; United States v. Wurzbach, 280 U.S. 396, 399, 50 S. Ct. 167, 74 L. Ed. 508; United States v. Ragen, 314 U.S. 513, 523, 62 S. Ct. 374, 86 L. Ed. 383

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One v Olesen, Postmaster

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1957

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241 F2d 772 One v. K Olesen

241 F.2d 772

ONE, Incorporated, a corporation, Appellant,

v.

Otto K. OLESEN, individually and as Postmaster of the City of Los Angeles, Appellee.

No. 15139.

United States Court of Appeals Ninth Circuit.

February 27, 1957.

Rehearing Denied April 12, 1957.

1

Eric Julber, Beverly Hills, Cal., for appellant.

2

Laughlin E. Waters, U. S. Atty., Marvin P. Carlock and Max F. Deutz, Asst. U. S. Attys., Los Angeles, Cal., for appellee.

3

Before BARNES and HAMLEY, Circuit Judges, and ROSS, District Judge.

4

ROSS, District Judge.

5

The plaintiff, One Incorporated, a California corporation, is the publisher of the magazine entitled "One", which carries with it the designation, "The Homosexual Magazine", and is published monthly in the

City of Los Angeles, California. The defendant, Otto K. Olesen, is the Postmaster of the City of Los Angeles, California.

6

Plaintiff delivered to the United States Post Office at Los Angeles, California, for transmission to various parts of the United States, several hundred copies of the October 1954 issue of "One", and was subsequently notified by the defendant that all copies so deposited for mailing were being withheld from dispatch for the reason that he considered the October 1954 issue of "One" obscene, lewd, lascivious and filthy, and as such constituted non-mailable matter under the provisions of Section 1461 of Title 18 U.S.C.A., and Section 36.2 of Vol. 29, Code of Federal Regulations (1949). Subsequently, all copies of the magazine were returned by the Postmaster to the plaintiff.

7

Plaintiff then commenced this action seeking a judgment declaring the October 1954 issue of "One" lawful and mailable, and an injunction against the Postmaster, his agents, servants and employees enjoining them from in any manner failing or refusing to dispatch in the regular course of mail the October 1954 issue of "One."

8

In the trial court, the parties stipulated that the only issue involved was whether the October 1954 issue of "One" is non-mailable matter under the provisions of 18 U.S.C.A. § 1461, and that such issue should be determined on the motions for summary judgment and the affidavits filed by each of the parties.

9

The trial court concluded that the Postmaster properly refused to transmit the October 1954 issue of "One" in the United States mails because it constitutes non-mailable matter under the provisions of 18 U.S.C.A. § 1461. From this adverse judgment, plaintiff appeals and asserts the following specifications of error:

10

1. The October 1954 issue of "One" is not lewd, lascivious, obscene or filthy, under the standards set forth in 18 U.S. C.A. § 1461, and the Findings of Fact set forth in Paragraph VI of the trial court's Findings of Fact, Conclusions of Law and Judgment, are erroneous as a matter of law and fact.

11

2. That action of the defendant in refusing to transmit said magazine is arbitrary, capricious and an abuse of discretion, unsupported by evidence, deprives plaintiff of equal protection of the laws and constitutes a deprivation of plaintiff's property and liberty without due process of law, and that therefore, the trial court's Conclusions of Law, specifically Paragraph I thereof, are erroneous as a matter of law and fact.

12

All of the evidence is in writing so we will review the entire evidence, giving due consideration to the findings and conclusions of the trial court. *United States v. United States Gypsum Co.*, 333 U.S. 364, 394, 395, 68 S.Ct. 525, 92 L.Ed. 746; *Besig v. United States*, 9 Cir., 1953, 208 F.2d 142, 144; *Orvis v. Higgins*, 2 Cir., 1950, 180 F.2d 537, 539; *Equitable Life Assurance Soc. of United States v. Irelan*, 9 Cir., 1941, 123 F.2d 462, 464; Rule 52(a) Fed.Rules Civ. Proc. 28 U.S.C.A.

13

The trial court in Paragraph 6 of its Findings of Fact, referred to by plaintiff in its specifications of error, made the following findings:

14

1. The story "Sappho Remembered" appearing on pages 12 through 15, is obscene because lustfully stimulating to the homosexual reader.

15

2. The poem "Lord Samuel and Lord Montagu", appearing on pages 18 and 19, is obscene because of the filthy language used in it.

16

3. The advertisement for the Swiss publication "The Circle" appearing at the top of page 29, is non-mailable matter because it gives information for the obtaining of obscene matter.

17

Briefly stated, the specifications of error made by plaintiff, raise but one question, namely: Whether or not the October 1954 issue of "One" is non-mailable matter under the provisions of Sec. 1461, Title 18 U.S.C.A.

18

The pertinent part of Sec. 1461, before the Amendment in 1955, is quoted as follows:

19

"Every obscene, lewd, lascivious, or filthy book, pamphlet, picture, paper, letter, writing, print, or other publication of an indecent character; and * * *

20

"Every written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, or how, or from whom, or by what means any of such mentioned matters, articles, or things may be obtained or made, * * *, whether sealed or unsealed; * * * is declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier. * * *"

21

Being thus advised we now look into the merits of the appeal. At the outset it is well to dispel any thought that this court is its brothers keeper as to the type of reading to be indulged in. Since the advent of the printing press eminent scholars, including some men of the bench and bar, have uttered and written imperishable words in defense of the freedom of thought and expression, and the place of a free press in a free world. We need not take issue with this gallant host.

22

As we view this case we are only concerned with the proper application of a postal regulation, a prosaic and every day matter of the administration of the post office department. Section 1461 amounts to no more than that. Approaching the problem in this workaday manner we find that "One" has already suffered two reverses in this connection, the first at the hands of the Postmaster, the other by reason of the judgment of the District Court sustaining the Postmaster's ruling. At this point it can be observed that there is no dispute on factual matters.

23

The District Court found that the ruling of the Postmaster was reasonable and supported by the proof — the contents of the magazine. Unless we find that the initial order of the Postmaster barring the magazine from the mails was arbitrary, or capricious, or an abuse of discretion, or that there are no reasonable grounds in the record to support the District Court in upholding the Postmaster's order, we are required to sustain.

24

Our problem here is one of the administration of the post office, and that in turn depends on whether or not the matter sought to be mailed, in this instance the October 1954 issue of the magazine "One", is obscene, lewd, lascivious, filthy or indecent. These words can only be defined by some discussion of the moral sense of the public, and it is only to such extent that we are concerned with public morals. In approaching the moral side of the issue here presented we are not unmindful of the fact that morals are not static like the everlasting hills, but are like the vagrant breezes to which the mariner must ever trim his sails.

25

The problem here posed cannot, however, be disposed of in a cavalier manner, for we are dealing with intangibles. Our ultimate conclusion as to whether the magazine isailable or not must be based upon the effect, or impact, that the wording of the various articles in the magazine have upon the reader. There is no precise pattern for reader reaction, so in determining whether the thought patterns created by the words employed in the magazine articles are obscene, lewd, lascivious, filthy or indecent, we must ascertain how other courts met the problem.

26

Much is now presented to the public, through eye and ear, which would have been offensive a generation ago, but does not today merit a second thought as to propriety. None the less, so long as statutes make use of such words as obscene, lewd, lascivious, filthy and indecent, we are compelled to define such expressions in the light of today's moral dictionary, even though the definition is at best a shifting one.

The words of the statute, "obscene", "lewd", lascivious", "filthy" and "indecent", are words of common usage and meaning. In considering the scope and meaning of the words the courts have, through the course of the years, given to such words legal definitions and distinctions, following very closely, if not precisely, the definitions and distinctions found in the recognized standard dictionaries.

Mr. Justice Harlan in delivering the opinion of the court in *Rosen v. United States*, 161 U.S. 29, 43, 16 S.Ct. 434, 438, 40 L.Ed. 606, said, "Every one who uses the mails of the United States for carrying papers or publications must take notice of what, in this enlightened age, is meant by decency, purity, and chastity in social life, and what must be deemed obscene, lewd, and lascivious." In that case the court approved the following test of obscenity given in an instruction of the trial court: "The test of obscenity is whether the tendency of the matter is to deprave and corrupt the morals of those whose minds are open to such influence and into whose hands a publication of this sort may fall." "Would it * * * suggest or convey lewd thoughts and lascivious thoughts to the young and inexperienced?"

In *Dunlop v. United States*, 165 U.S. 486, 500, 501, 17 S.Ct. 375, 380, 41 L.Ed. 799, the Supreme Court approved the following instruction:

"Now what are obscene, lascivious, lewd, or indecent publications is largely a question of your own conscience and your own opinion; but it must come — before it can be said of such literature or publication — it must come up to this point: that it must be calculated with the ordinary reader to deprave him, deprave his morals, or lead to impure purposes. * * * It is your duty to ascertain, in the first place if they are calculated to deprave the morals; if they are calculated to lower that standard which we regard as essential to civilization; if they are calculated to excite those feelings which, in their proper field, are all right, but which, transcending the limits of that proper field, play most of the mischief in the world."

In *Swearingen v. United States*, 161 U.S. 446, 16 S.Ct. 562, 40 L.Ed. 765, the Supreme Court in distinguishing matter which is coarse and vulgar, from obscene, lewd and lascivious matter, held that coarse and vulgar language is not within the meaning of the words, obscene, lewd and lascivious. It was said that the words "obscene", "lewd" and "lascivious", as used in the Statute, signify that form of immorality which has relation to sexual impurity, and that it could not perceive of anything in the coarse and vulgar language used in the questioned letter, which was of a lewd, lascivious and obscene tendency, calculated to corrupt and debauch the mind and morals of those into whose hands it might fall.

The Supreme Court in *United States v. Limehouse*, 285 U.S. 424, 52 S.Ct. 412, 76 L.Ed. 843, distinguished filthy matter from obscene, lewd or lascivious matter in holding that filthy material

constituted a new class of non-mailable matter.

33

The Sixth Circuit in *Tyomies Publishing Co. v. United States*, 211 F. 385, at page 390, defined the word "filthy" as meaning "that which is nasty, dirty, vulgar, indecent, offensive to the moral senses, morally depraving and debasing."

34

This Court in *Magon v. United States*, 248 F. 201, noted it had been uniformly held in construing the word "obscene", as used in the particular statute, that if the matter were of such nature as would tend to corrupt the morals of those whose minds are open to such influences by arousing or implanting in such minds lewd or lascivious thoughts or desires, it is within the prohibition of the statute.

35

In *Duncan v. United States*, 48 F.2d 128, on page 132, we stated that the test is whether or not the language alleged to be obscene would arouse lewd or lascivious thoughts in the minds of those hearing or reading the publication. The definition and meaning of the words obscene, lewd and lascivious were again considered by this court in *Burstein v. United States*, 1949, 178 F.2d 665, and in *Besig v. United States*, 1953, 208 F.2d 142.

36

Judge Pope, in *Burstein v. United States*, 9 Cir., 178 F.2d 665, 666, approved the following instruction defining obscene, lewd, or lascivious:

37

"Matter is obscene, lewd, or lascivious, within the meaning of the quoted statute, if it is offensive to the common sense of decency and modesty of the community, and tends to suggest or arouse sexual desires or thoughts in the minds of those who by means thereof may be depraved or corrupted in that regard. The true inquiry in this case is whether or not the publication charged to have been obscene was in fact of that character, and if it was, and the defendant knew its contents at the time he deposited it in the mail, it is not material that he, himself, did not regard it as obscene * * * The true test to determine whether a writing is nonmailable as obscene, lewd, or lascivious is whether its language has a tendency to deprave or corrupt the morals of those whose minds are open to such influences and into whose hands it may fall by allowing or implanting in such minds obscene, lewd, or lascivious thoughts or desires."

38

For another definition of the words obscene, lewd, lascivious, filthy and indecent, and an attempted differentiation, see *Sunshine Book Company v. Summerfield*, D.C., 128 F.Supp. 564, 568. There the court said:

39

"Those definitions are the beacons by which the legal channel is lighted for the Court * * *".

When the approved definitions and tests are applied to certain articles in the "One" magazine, it is apparent that the magazine is obscene and filthy and is therefore non-mailable matter.

Plaintiff, as publisher, states on the second page of the magazine that it is published for the purpose of dealing primarily with homosexuality from the scientific, historical and critical point of view — to sponsor educational programs, lectures and concerts for the aid and benefit of social variants and to promote among the general public an interest, knowledge and understanding of the problems of variation. The story "Sappho Remembered", appearing on pages 12 to 15 of the magazine, the poem "Lord Samuel and Lord Montagu" on pages 18 and 19, and the information given on page 29 as to where to obtain "The Circle", a magazine "with beautiful photos", do not comport with the lofty ideals expressed on page 2 by the publishers.

The article "Sappho Remembered" is the story of a lesbian's influence on a young girl only twenty years of age but "actually nearer sixteen in many essential ways of maturity", in her struggle to choose between a life with the lesbian, or a normal married life with her childhood sweetheart. The lesbian's affair with her room-mate while in college, resulting in the lesbian's expulsion from college, is recounted to bring in the jealousy angle. The climax is reached when the young girl gives up her chance for a normal married life to live with the lesbian. This article is nothing more than cheap pornography calculated to promote lesbianism. It falls far short of dealing with homosexuality from the scientific, historical and critical point of view.

The poem "Lord Samuel and Lord Montagu" is about the alleged homosexual activities of Lord Montagu and other British Peers and contains a warning to all males to avoid the public toilets while Lord Samuel is "sniffing round the drains" of Piccadilly (London). The poem pertains to sexual matters of such a vulgar and indecent nature that it tends to arouse a feeling of disgust and revulsion. It is dirty, vulgar and offensive to the moral senses. *Swearingen v. United States*, 161 U.S. 446, 16 S.Ct. 562, 40 L.Ed. 765; *United States v. Limehouse*, 285 U.S. 424, 426, 52 S.Ct. 412, 76 L.Ed. 843; *Tyomies Publishing Co. v. United States*, 6 Cir., 1914, 211 F. 385, 390; *United States v. Roth*, 2 Cir., 237 F.2d 796, 799, 800.

An article may be vulgar, offensive and indecent even though not regarded as such by a particular group of individuals constituting a small segment of the population because their own social or moral standards are far below those of the general community. Social standards are fixed by and for the great majority and not by or for a hardened or weakened minority. As this Court said in *Besig v. United States*, 208 F.2d 142, at page 145:

"It is of course true that the ears of some may be so accustomed to words which are ordinarily regarded as obscene that they take no offense at them, but the law is not tempered to the hardened minority of society. The statute forbidding the importation of obscene books is not designed to fit the normal concept of morality of society's dregs, nor of the different concepts of morality throughout the world, nor for all time past and future, but is designed to fit the normal American concept in the age in which we live. It is no legitimate argument that because there are social groups composed of moral delinquents in this or in other countries, that their language shall be received as legal tender along with the speech of the great masses who trade ideas and information in the honest money of decency."

46

It is difficult to determine if the article contained on page 29 under the caption "Foreign Books and Magazines That Will Interest You", is an advertisement for the magazine "The Circle" or is merely information given by the publisher of "One" to its readers as to where to obtain other books and magazines that may be of interest. Regardless, the situation is the same, if information is given as to where, or how, or from whom, or by what means, obscene or filthy material may be obtained. Although on its face the information in this article appears harmless, it cannot be said that the purpose is harmless. It is for the information of those who read the magazine and particularly the homosexuals. It conveys information to the homosexual or any other reader as to where to get more of the material contained in "One."

47

An examination of "The Circle" clearly reveals that it contains obscene and filthy matter which is offensive to the moral senses, morally depraving and debasing, and that it is designed for persons having lecherous and salacious proclivities.

48

The picture and the sketches are obscene and filthy by prevailing standards. The stories "All This and Heaven Too", and "Not Til the End", pages 32-36, are similar to the story "Sappho Remembered", except that they relate to the activities of the homosexuals rather than lesbians. Such stories are obscene, lewd and lascivious. They are offensive to the moral senses, morally depraving and debasing. Such literature cannot be classed as historical, scientific and educational for any class of persons. Cheap pornography is a more appropriate classification.

49

Plaintiff contends that the magazine "One" when read as a whole is not obscene or filthy within the meaning of these words. In *Besig v. United States*, supra, we held that the book as a book must be obscene to justify its libel and destruction, but we also held that neither the number of the "objectionable" passages nor the proportion they bear to the whole book are controlling. The magazine under consideration, by reason of the articles referred to, has a primary purpose of exciting lust, lewd and lascivious thoughts and sensual desires in the minds of the persons reading it. Moreover, such articles are morally depraving and debasing. The articles mentioned are sufficient to label the magazine as a whole, obscene and filthy.

50

In *Parmelee v. United States*, 72 App. D.C. 203, 113 F.2d 729, 730, speaking of the "book as a whole" doctrine, the court having before it a related problem, said:

51

"Although the word [obscene] has been variously defined, the test in many of the earlier cases was that laid down by Lord Chief Justice Cockburn in *Regina v. Hicklin* [3 Q.B. 360, 369, 1868], as follows: `* * * whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall.' And the rule was applied to those portions of the book charged to be obscene rather than to the book as a whole. But more recently this standard has been repudiated, and for it has been substituted the test that a book must be considered as a whole, in its effect, not upon any particular class, but upon all those whom it is likely to reach."

52

The point that the action of the defendant in refusing to transmit the magazine in the United States mails, is arbitrary, capricious, an abuse of discretion and unsupported by the evidence, is without merit. The only argument to sustain this point is that the magazine is not obscene or filthy under the standards set forth in 18 U.S.C.A. § 1461. We have decided otherwise.

53

Plaintiff also contends that it has been deprived of the equal protection of the laws. In the trial court, plaintiff stipulated that the only issue involved was whether the October 1954 issue of "One" is non-mailable matter under the provisions of 18 U.S.C.A. § 1461, and that such issue should be determined on the motions for summary judgment and the affidavits filed by each of the parties. There is nothing in the record to show that plaintiff has been denied the equal protection of the laws. Section 1461, Title 18 U.S.C.A. is applicable to all matter declared by the statute to be non-mailable, without regard to the character of the persons or class of persons seeking to use the mails for the dissemination of non-mailable matter.

54

Plaintiff's contention that there has been a denial of due process of law is without merit. Plaintiff commenced this action in the trial court and stipulated that the only issue in the case should be determined by the court on the motions for summary judgment and the affidavits filed by each of the parties. There has been a full and fair trial upon proper notice and the issues presented. It does not appear from the record that plaintiff has been deprived of property or liberty without due process of law.

55

Based upon our comments and observations heretofore given we hold that the record discloses no prejudicial error and the judgment appealed from is affirmed.

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One v Olesen, Postmaster

355 US 371

1958

355 U. S.

Per Curiam.

ONE, INCORPORATED; v. OLESEN, POSTMASTER
OF LOS ANGELES.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 290. Decided January 13, 1958.

241 F. 2d 772, reversed.

Eric Julber for petitioner.

*Solicitor General Rankin, Acting Assistant Attorney
General Leonard and Samuel D. Slade* for respondent.

PER CURIAM.

The petition for writ of certiorari is granted and the judgment of the United States Court of Appeals for the Ninth Circuit is reversed. *Roth v. United States*, 354 U. S. 476.

Manual v Day, Postmaster

289 F.2d 455

1961

JUSTIA

Manual Enterprises, Inc., et al., Appellants, v. J. Edward Day, Postmaster General, Appellee, 289 F.2d 455 (D.C. Cir. 1961)

U.S. Court of Appeals for the District of Columbia Circuit - 289 F.2d 455 (D.C. Cir. 1961)

**Argued February 13, 1961
Decided March 23, 1961**

Mr. Stanley M. Dietz, Washington, D. C., for appellants.

Mr. Donald S. Smith, Asst. U. S. Atty., with whom Messrs. Oliver Gasch, U. S. Atty., and Carl W. Belcher, Asst. U. S. Atty., were on the brief, for appellee. Mr. Frank Q. Nebeker, Asst. U. S. Atty., also entered an appearance for appellee.

Before FAHY, DANAHER and BASTIAN, Circuit Judges.

BASTIAN, Circuit Judge.

In April, 1960, postal officials determined that three magazines, "Manual," "Trim," and "Grecian Guild Pictorial," (hereinafter referred to as appellants), were non-mailable under 18 U.S.C. § 1461 as being obscene and as conveying information as to how and where obscene matter might be obtained. Pursuant to this determination, copies of the magazines

were withheld from dispatch. Shortly thereafter an administrative hearing was conducted, in which appellants participated, which ended adversely to appellants. Suit for injunctive relief was then filed in District Court. Appellants' motion for preliminary injunction was denied. On cross-motions for summary judgment, appellants' was denied, and appellee's was granted. This appeal followed.

The magazines in question are physique magazines, composed almost exclusively of photographs of nearly nude male models. Each photograph is accompanied by a brief caption giving the names of the model and photographer. Each issue also contains an index listing the photographers who have contributed to that magazine and a few advertisements from photographers and studios offering collections of nude photographs.

At the administrative hearing psychiatrists testified in great detail, explaining how and why the poses used in most of the pictures and the clothing worn by the models would arouse great prurient interest in homosexuals. Psychiatric testimony was also given to the effect that certain objects (swords and chains) used in some of the pictures were primary symbols of sexual fantasies of deviants within the homosexual group.

A postal inspector testified that, using an assumed name, he submitted orders to some of appellants' advertisers and received from them photographs of nude males with the pubic area exposed to view. He further testified that, in his experience, additional orders would produce photographs progressively more lascivious. Investigations at the studios which mailed the particular photographs here involved resulted in the discovery of what was termed "hard core pornography," photographs of groups of nude males engaged in homosexual activities.

Appellants contend that these magazines are body-building magazines, and that the publishers have no way of knowing whether newsstand sales are made to homosexuals or body-building enthusiasts. They further contend that they can not be charged with the photographs found in the course of the investigations because they were not sent through the mails and that the photographs which were actually sent are not obscene because nudity as such is not obscene.

We think there was substantial evidence on the administrative record to support the conclusion that these magazines were intended for homosexuals. Overlooking the testimony that Herman Womack (the owner of two of the magazines and the publisher of all three) actually admitted such intent, the expert testimony as to the effect of the published pictures on homosexuals coupled with the obvious lack of relationship of the "posing straps," heavy boots, helmets, swords, and chains to any interest in body-building, we

think, amply supports the inference that these pictures were deliberately published because of their effect upon homosexuals.

Appellants contend that even if these pictures do arouse prurient interests in homosexuals, they are not obscene within the definition of *Roth v. United States*, 1957, 354 U.S. 476, 77 S. Ct. 1304, 1 L. Ed. 2d 1498, the so-called "average person in the community" test. It seems to us that the real meaning of *Roth* is that the object in question is not to be considered in terms of the reaction of an isolated atypical consumer. A case of obscenity thus is not to be predicated on the reaction of the peculiarly prudish or susceptible, and neither is a defense to such a charge to be predicated on the lack of reaction on the part of the peculiarly jaded. On the basis of the evidence before the administrative body, we think that "the average member of the community" would be an atypical reader of these magazines. The proper test in this case, we think, is the reaction of the average member of the class for which the magazines were intended, homosexuals. The testimony of record was clearly to the effect that these magazines would arouse prurient interest in the average homosexual. The finding that these magazines were obscene within the meaning of the statute is therefore affirmed.

The testimony of the postal inspector as to his experience in the progressive nature of the material sent through the mails by the advertisers, together with the photographs actually so sent and those seized at the same studios, we think, furnishes substantial evidence for the conclusion that the advertisements in these magazines did give information with respect to where, how and from whom obscene matter could be obtained. The foregoing omits consideration of whether the photographs actually sent through the mails were obscene. A prior decision of this court has held such matter to be obscene. See *Womack v. United States*, ___ U.S.App.D.C. ___, ___ F.2d ___ decided Jan. 12, 1961. This finding of the administrative body is likewise affirmed.

The judgment of the District Court is therefore

Affirmed.

FAHY, Circuit Judge, concurs in the result.

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*Memoirs v
Massachusetts*

383 US 413

1966

Memoirs v. Massachusetts, 383 U.S. 413 (1966)

[Overview](#)

[Opinions](#)

[Materials](#)

Argued:

December 7, 1965

Argued:

December 8, 1965

Decided:

March 21, 1966

Syllabus

U.S. Supreme Court

Memoirs v. Massachusetts, 383 U.S. 413 (1966)

A Book Named "John Cleland's Memoirs of a Woman of Pleasure"

v. Attorney General of Massachusetts

No. 368

Argued December 7-8, 1965

Decided March 21, 1966

383 U.S. 413

Syllabus

Appellee, the Attorney General of Massachusetts, brought this civil equity action for an adjudication of obscenity of Cleland's *Memoirs of a Woman of Pleasure* (Fanny Hill), and appellant publisher intervened. Following a hearing, including expert testimony and other evidence, assessing the book's character but not the mode of distribution, the trial court

decreed the book obscene and not entitled to the protection of the First and Fourteenth Amendments. The Massachusetts Supreme Judicial Court affirmed, holding that a patently offensive book which appeals to prurient interest need not be unqualifiedly worthless before it can be deemed obscene.

Held: The judgment is reversed. Pp. 383 U. S. 415-433.

349 Mass. 69, 206 N.E.2d 403, reversed.

MR. JUSTICE BRENNAN, joined by THE CHIEF JUSTICE and MR. JUSTICE FORTAS, concluded that:

1. Under the test in *Roth v. United States*, 354 U. S. 476, as elaborated in subsequent cases, each of three elements must independently be satisfied before a book can be held obscene: (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters, and (c) the material is utterly without redeeming social value. P. 383 U. S. 418.

2. Since a book cannot be proscribed as obscene unless found to be *utterly* without redeeming social value, the Supreme Judicial Court erroneously interpreted the federal constitutional standard. Pp. 383 U. S. 419-420.

3. On the premise, not assessed here, that it has the requisite prurient appeal, is patently offensive, and has only a modicum of social importance, evidence of commercial exploitation of the book for the sake of prurient appeal to the exclusion of all other values

Page 383 U. S. 414

might in different proceeding justify the conclusion that the publication and distribution of *Memoirs* was not constitutionally protected. *Ginzburg v. United States, post*, p. 383 U. S. 463. Pp. 383 U. S. 420-421.

MR. JUSTICE BLACK and MR. JUSTICE STEWART concur in the reversal for the reasons given in their respective dissenting opinions in *Ginzburg v. United States, post*, p. 383 U. S. 476 and p. 383 U. S. 497 and *Mishkin v. New York, post*, p. 383 U. S. 515 and p. 383 U. S. 518. P. 383 U. S. 421.

MR JUSTICE DOUGLAS concluded that:

1. Since the First Amendment forbids censorship of expression of ideas not linked with illegal action, *Fanny Hill* cannot be proscribed. Pp. 383 U. S. 426; 383 U. S. 427-433.
2. Even under the prevailing view of the *Roth* test the book cannot be held to be obscene in view of substantial evidence showing that it has literary, historical, and social importance. P. 383 U. S. 426.
3. Since there is no power under the First Amendment to control mere expression, the manner in which a book that concededly has social worth is advertised and sold is irrelevant. P. 383 U. S. 427.
4. There is no basis in history for the view expressed in *Roth* that "obscene" speech is "outside" the protection of the First Amendment. Pp. 383 U. S. 428-431.
5. No interest of society justifies overriding the guarantees of free speech and press and establishing a regime of censorship. Pp. 383 U.S. 431-433.

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U.S. Supreme Court

Memoirs v. Massachusetts, 383 U.S. 413 (1966)

A Book Named "John Cleland's Memoirs of a Woman of Pleasure"

v. Attorney General of Massachusetts

No. 368

Argued December 7-8, 1965

Decided March 21, 1966

383 U.S. 413

APPEAL FROM THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

Syllabus

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1. Since the First Amendment forbids censorship of expression of ideas not linked with illegal action, *Fanny Hill* cannot be proscribed. Pp. 383 U. S. 426; 383 U. S. 427-433.

2. Even under the prevailing view of the *Roth* test the book cannot be held to be obscene in view of substantial evidence showing that it has literary, historical, and social importance. P. 383 U. S. 426.

3. Since there is no power under the First Amendment to control mere expression, the manner in which a book that concededly has social worth is advertised and sold is irrelevant. P. 383 U. S. 427.

4. There is no basis in history for the view expressed in *Roth* that "obscene" speech is "outside" the protection of the First Amendment. Pp. 383 U. S. 428-431.

5. No interest of society justifies overriding the guarantees of free speech and press and establishing a regime of censorship. Pp. 383 U.S. 431-433.

MR. JUSTICE BRENNAN announced the judgment of the Court and delivered an opinion in which THE CHIEF JUSTICE and MR. JUSTICE FORTAS join.

This is an obscenity case in which *Memoirs of a Woman of Pleasure* (commonly known as *Fanny Hill*), written by John Cleland in about 1750, was adjudged obscene in a proceeding that put on trial the book itself, and not its publisher or distributor. The proceeding was a civil equity suit brought by the Attorney General of Massachusetts, pursuant to General Laws of Massachusetts, Chapter 272, §§ 28C-28H, to have the book declared obscene. [Footnote 1] Section 28C requires that the petition commencing the suit be "directed against [the] book by name" and that an order to show cause "why said book should not be judicially determined to be obscene" be published in a daily newspaper and sent by registered mail "to all persons interested in the publication." Publication of the order in this case occurred in a Boston daily newspaper, and a copy of the order was sent by registered mail to G. P. Putnam's Sons, alleged to be the publisher and copyright holder of the book.

As authorized by § 28D, G. P. Putnam's Sons intervened in the proceedings in behalf of the book, but it did not claim the right provided by that section to have the issue of obscenity tried by a jury. At the hearing before a justice of the Superior Court, which was conducted, under § 28F, "in accordance with the usual course of proceedings in equity," the court received the book in evidence and also, as allowed by the section, heard the testimony of experts [Footnote 2] and accepted other evidence, such

as book reviews, in order to assess the literary, cultural, or educational character of the book. This constituted the entire evidence, as neither side availed itself of the

opportunity provided by the section to introduce evidence "as to the manner and form of its publication, advertisement, and distribution." [Footnote 3] The trial justice entered a final decree, which adjudged *Memoirs* obscene and declared that the book

"is not entitled to the protection of the First and Fourteenth Amendments to the Constitution of the United States against action by the Attorney General or other law enforcement officer pursuant to the provisions of . . . 28B, or otherwise. [Footnote 4]"

The Massachusetts Supreme Judicial Court affirmed the decree. 349 Mass. 69, 206 N.E.2d 403 (1965). We noted probable jurisdiction. 382 U. S. 900. We reverse. [Footnote 5]

I

The term "obscene" appearing in the Massachusetts statute has been interpreted by the Supreme Judicial Court to be as expansive as the Constitution permits: the "statute covers all material that is obscene in the constitutional sense." *Attorney General v. The Book Named "Tropic of Cancer,"* 345 Mass. 11, 13, 184 N.E.2d 328, 330 (1962). Indeed, the final decree before us equates the finding that *Memoirs* is obscene within the meaning of the statute with the declaration that the book is not entitled to the protection of the First Amendment. [Footnote 6] Thus, the sole question before the state courts was whether *Memoirs* satisfies the test of obscenity established in *Roth v. United States*, 354 U. S. 476.

We defined obscenity in *Roth* in the following terms:

"[W]hether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."

354 U.S. at 354 U. S. 489. Under this definition, as elaborated in subsequent cases, three elements must coalesce: it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters, and (c) the material is utterly without redeeming social value.

The Supreme Judicial Court purported to apply the *Roth* definition of obscenity and held all three criteria satisfied. We need not consider the claim that the court erred in concluding that *Memoirs* satisfied the prurient

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appeal and patent offensiveness criteria; for reversal is required because the court misinterpreted the social value criterion. The court applied the criterion in this passage:

"It remains to consider whether the book can be said to be 'utterly without social importance.' We are mindful that there was expert testimony, much of which was strained, to the effect that *Memoirs* is a structural novel with literary merit; that the book displays a skill in characterization and a gift for comedy; that it plays a part in the history of the development of the English novel, and that it contains a moral, namely, that sex with love is superior to sex in a brothel. But the fact that the testimony may indicate this book has some minimal literary value does not mean it is of any social importance. We do not interpret the 'social importance' test as requiring that a book which appeals to prurient interest and is

patently offensive must be unqualifiedly worthless before it can be deemed obscene."

349 Mass. at 73, 206 N.E.2d at 406. The Supreme Judicial Court erred in holding that a book need not be "unqualifiedly worthless before it can be deemed obscene." A book cannot be proscribed unless it is found to be *utterly* without redeeming social value. This is so even though the book is found to possess the requisite prurient appeal and to be patently offensive. Each of the three federal constitutional criteria is to be applied independently; the social value of the book can neither be weighed against nor canceled by its prurient appeal or patent offensiveness. [Footnote 7] Hence,

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even on the view of the court below that *Memoirs* possessed only a modicum of social value, its judgment must be reversed as being founded on an erroneous interpretation of a federal constitutional standard.

II

It does not necessarily follow from this reversal that a determination that *Memoirs* is obscene in the constitutional sense would be improper under all circumstances. On the premise, which we have no occasion to assess, that *Memoirs* has the requisite prurient appeal and is patently offensive, but has only a minimum of social value, the circumstances of production, sale, and publicity are relevant in determining whether or not the publication or distribution of the book is constitutionally protected. Evidence that the book was commercially exploited for the sake of prurient appeal, to the exclusion of all other values, might justify the conclusion that the book was utterly without redeeming social importance. It is not that, in such a setting the social value test is relaxed so as to dispense with the requirement that a book be *utterly* devoid of social value, but rather that, as we elaborate in *Ginzburg v. United States*, *post*, pp. 383 U. S. 470-473, where the purveyor's sole emphasis is on the sexually provocative aspects of his publications, a court could accept his evaluation at its face value. In this proceeding, however, the courts were asked to judge the obscenity of *Memoirs* in the abstract, and the declaration of obscenity was neither aided nor limited by a specific set of circumstances of production, sale, and publicity. [Footnote 8]

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All possible uses of the book must therefore be considered, and the mere risk that the book might be exploited by panders because it so pervasively treats sexual matters cannot alter the fact -- given the view of the Massachusetts court attributing to *Memoirs* a modicum of literary and historical value -- that the book will have redeeming social importance in the hands of those who publish or distribute it on the basis of that value.

importance in the hands of those who publish or distribute it on the basis of that value.

Reversed.

MR. JUSTICE BLACK and MR. JUSTICE STEWART concur in the reversal for the reasons stated in their respective dissenting opinions in *Ginzburg v. United States*, *post*, p. 383 U. S. 476 and p. 383 U. S. 497 and *Mishkin v. New York*, *post*, p. 383 U. S. 515 and p. 383 U. S. 518.

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APPENDIX TO OPINION OF

MR. JUSTICE BRENNAN

STATE STATUTE

MASSACHUSETTS GENERAL LAWS, CHAPTER 272

SECTION 28B. Whoever imports, prints, publishes, sells, loans or distributes, or buys, procures, receives, or

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has in his possession for the purpose of sale, loan or distribution, a book, knowing it to be obscene, indecent or impure, or whoever, being a wholesale distributor, a jobber, or publisher sends or delivers to a retail storekeeper a book, pamphlet, magazine or other form of printed or written material, knowing it to be obscene, indecent or impure, which said storekeeper had not previously ordered in writing, specifying the title and quantity of such publication he desired, shall be punished by imprisonment in the state prison for not more than five years or in a jail or house of correction for not more than two and one half years, or by a fine of not less than one hundred dollars nor more than five thousand dollars, or by both such fine and imprisonment in jail or the house of correction.

SECTION 28C. Whenever there is reasonable cause to believe that a book which is being imported, sold, loaned or distributed, or is in the possession of any person who intends to import sell, loan or distribute the same, is obscene, indecent or impure, the attorney general, or any district attorney within his district, shall bring an information or petition in equity in the superior court directed against said book by name. Upon the filing of such information or petition in equity, a justice of the superior court shall, if, upon a summary examination of the book, he is of opinion that there is reasonable cause to believe that such book is obscene, indecent or impure, issue an order of notice, returnable in or within thirty

days, directed against such book by name and addressed to all persons interested in the publication, sale, loan or distribution thereof, to show cause why said book should not be judicially determined to be obscene, indecent or impure. Notice of such order shall be given by publication once each week for two successive weeks in a daily newspaper published in the city of Boston and, if such information or petition be filed in any county other than

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Suffolk county, then by publication also in a daily newspaper published in such other county. A copy of such order of notice shall be sent by registered mail to the publisher of said book, to the person holding the copyrights, and to the author, in case the names of any such persons appear upon said book, fourteen days at least before the return day of such order of notice. After the issuance of an order of notice under the provisions of this section, the court shall, on motion of the attorney general or district attorney, make an interlocutory finding and adjudication that said book is obscene, indecent or impure, which finding and adjudication shall be of the same force and effect as the final finding and adjudication provided in section twenty-eight E or section twenty-eight F, but only until such final finding and adjudication is made or until further order of the court.

SECTION 28D. Any person interested in the sale, loan or distribution of said book may appear and file an answer on or before the return day named in said notice or within such further time as the court may allow, and may claim a right to trial by jury on the issue whether said book is obscene, indecent or impure.

SECTION 28E. If no person appears and answers within the time allowed, the court may at once upon motion of the petitioner, or of its own motion, no reason to the contrary appearing, order a general default and if the court finds that the book is obscene, indecent or impure, may make an adjudication against the book that the same is obscene, indecent and impure.

SECTION 28F. If an appearance is entered and answer filed, the case shall be set down for speedy hearing, but a default and order shall first be entered against all persons who have not appeared and answered, in the manner provided in section twenty-eight E. Such hearing shall be conducted in accordance with the usual course of proceedings in equity including all rights of exception and

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appeal. At such hearing the court may receive the testimony of experts and may receive evidence as to the literary, cultural or educational character of said book and as to the

manner and form of its publication, advertisement, and distribution. Upon such hearing, the court may make an adjudication in the manner provided in said section twenty-eight E.

SECTION 28G. An information or petition in equity under the provisions of section twenty-eight C shall not be open to objection on the ground that a mere judgment, order or decree is sought thereby and that no relief is or could be claimed thereunder on the issue of the defendant's knowledge as to the obscenity, indecency or impurity of the book.

SECTION 28H. In any trial under section twenty-eight B on an indictment found or a complaint made for any offence committed after the filing of a proceeding under section twenty-eight C, the fact of such filing and the action of the court or jury thereon, if any, shall be admissible in evidence. If prior to the said offence a final decree had been entered against the book, the defendant, if the book be obscene, indecent or impure, shall be conclusively presumed to have known said book to be obscene, indecent or impure, or if said decree had been in favor of the book he shall be conclusively presumed not to have known said book to be obscene, indecent or impure, or if no final decree had been entered but a proceeding had been filed prior to said offence, the defendant shall be conclusively presumed to have had knowledge of the contents of said book.

[Footnote 1]

The text of the statute appears in the 383 U.S. 413app|>Appendix.

[Footnote 2]

In dissenting from the Supreme Judicial Court's disposition in this case, 349 Mass. 69, 775, 206 N.E.2d 403, 406-407 (1965), Justice Whittemore summarized this testimony:

"In the view of one or another or all of the following *viz.*, the chairman of the English department at Williams College, a professor of English at Harvard College, an associate professor of English literature at Boston University, an associate professor of English at Massachusetts Institute of Technology, and an assistant professor of English and American literature at Brandeis University, the book is a minor 'work of art' having 'literary merit' and 'historical value' and containing a good deal of 'deliberate, calculated comedy.' It is a piece of 'social history of interest to anyone who is interested in fiction as a way of understanding society in the past.'^[1] A saving grace is that, although many scenes, if translated"

" 1. One of the witnesses testified in part as follows: "Cleland is part of what I should call this cultural battle that is going on in the 18th century, a battle between a restricted

Puritan, moralistic ethic that attempts to suppress freedom of the spirit, freedom of the flesh, and this element is competing with a freer attitude towards life, a more generous attitude towards life, a more wholesome attitude towards life, and this very attitude that is manifested in Fielding's great novel *Tom Jones*' is also evident in Cleland's novel. . . .

[Richardson's] *'Pamela'* is the story of a young country girl; [his] *'Clarissa'* is the story of a woman trapped in a house of prostitution. Obviously, then Cleland takes both these themes, the country girl, her initiation into life and into experience, and the story of a woman in a house of prostitution, and what he simply does is to take the situation and reverse the moral standards. Richardson believed that chastity was the most important thing in the world; Cleland and Fielding obviously did not, and thought there were more important significant moral values.'"

"into the present day language of 'the realistic, naturalistic novel, could be quite offensive' these scenes are not described in such language. The book contains no dirty words and its language 'functions . . . to create a distance, even when the sexual experiences are portrayed.' The response, therefore, is a literary response. The descriptions of depravity are not obscene because 'they are subordinate to an interest which is primarily literary;' Fanny's reaction to the scenes of depravity was 'anger,' 'disgust, horror, [and] indignation.' The book 'belongs to the history of English literature, rather than the history of smut.'"

" 2. In the opinion of the other academic witness, the headmaster of a private school, whose field is English literature, the book is without literary merit and is obscene, impure, hard core pornography, and is patently offensive."

[Footnote 3]

The record in this case is thus significantly different from the records in *Ginzburg v. United States*, post, p. 383 U. S. 463, and *Mishkin v. New York*, post, p. 383 U. S. 502. See pp 383 U. S. 420-421, *infra*.

[Footnote 4]

Section 28B makes it a criminal offense, *inter alia*, to import, print, publish, sell, loan, distribute, buy, procure, receive, or possess for the purpose of sale, loan, or distribution, "a book, knowing it to be obscene." Section 28H provides that, in any prosecution under § 2813, the decree obtained in a proceeding against the book "shall be admissible in evidence," and further that,

"[i]f prior to the said offence a final decree had been entered against the book, the defendant, if the book be obscene . . . shall be conclusively presumed to have known said

book to be obscene. . . ."

Thus a declaration of obscenity such as that obtained in this proceeding is likely to result in the total suppression of the book in the Commonwealth.

The constitutionality of § 28H has not been challenged in this appeal.

[Footnote 5]

Although the final decree provides no coercive relief, but only a declaration of the book's obscenity, our adjudication of the merits of the issue tendered, *viz.*, whether the state courts erred in declaring the book obscene, is not premature. There is no uncertainty as to the content of the material challenged, and the Attorney General's petition commencing this suit states that the book "is being imported, sold, loaned, or distributed in the Commonwealth." The declaration of obscenity is likely to have a serious inhibitory effect on the distribution of the book, and this probable impact is to no small measure derived from possible collateral uses of the declaration in subsequent prosecutions under the Massachusetts criminal obscenity statute. *See* n 4, *supra*.

[Footnote 6]

We infer from the opinions below that the other adjectives describing the proscribed books in §§ 28C-28H, "indecent" and "impure," have either been read out of the statute or deemed synonymous with "obscene."

[Footnote 7]

"[M]aterial dealing with sex in a manner that advocates ideas, . . . or that has literary or scientific or artistic value or any other form of social importance, may not be branded as obscenity and denied the constitutional protection. Nor may the constitutional status of the material be made to turn on a 'weighing' of its social importance against its prurient appeal, for a work cannot be proscribed unless it is 'utterly' without social importance. *See Zeitlin v. Arnebergh*, 59 Cal. 2d 901, 920, 383 P.2d 152, 165, 31 Cal. Rptr. 800, 813 (1963)."

Jacobellis v. Ohio, 378 U. S. 184, 378 U. S. 191 (opinion of BRENNAN, J.). Followed in, *e.g.*, *People v. Bruce*, 31 Ill. 2d 459, 461, 202 N.E.2d 497, 498 (1964); *Trans-Lux Distributing Corp. v. Maryland Bd. of Censors*, 240 Md. 98, 104-105, 213 A.2d 235, 238-239 (1965).

[Footnote 8]

In his dissenting opinion, 349 Mass. at 76-78, 206 N.E.2d at 408-409, Justice Cutter stated that although in his view the book was not "obscene" within the meaning of Roth, "it could

...; although many of the books have not survived, it seems reasonably be found that distribution of the book to persons under the age of eighteen would be a violation of G. L. c. 272, § 28, as tending to corrupt the morals of youth." (Section 28 makes it a crime to sell to "a person under the age of eighteen years a book . . . which is obscene . . . or manifestly tends to corrupt the morals of youth.") He concluded that the court should

"limit the relief granted to a declaration that distribution of this book to persons under the age of eighteen may be found to constitute a violation of [G. L.] c. 272, § 28, if that section is reasonably applied. . . ."

However, the decree was not so limited and we intimate no view concerning the constitutionality of such a limited declaration regarding *Memoirs*. Cf. *Jacobellis v. Ohio*, 378 U.S. at 378 U. S. 195.

MR. JUSTICE DOUGLAS, concurring in the judgment.

Memoirs of a Woman of Pleasure, or, as it is often titled, *Fanny Hill*, concededly is an erotic novel. It was first published in about 1749, and has endured to this

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date, despite periodic efforts to suppress it. [Footnote 2/1] The book relates the adventures of a young girl who becomes a prostitute in London. At the end, she abandons that life and marries her first lover, observing:

"Thus, at length, I got snug into port, where, in the bosom of virtue, I gather'd the only uncorrupt sweets: where, looking back on the course of vice I had run, and comparing its infamous blandishments with the infinitely superior joys of innocence, I could not help pitying, even in point of taste, those who, immers'd in gross sensuality, are insensible to the so delicate charms of VIRTUE, than which even PLEASURE has not a greater friend, nor than VICE a greater enemy. Thus, temperance makes men lords over those pleasures that intemperance enslaves them to: the one, parent of health, vigour, fertility, cheerfulness, and every other desirable good of life; the other, of diseases, debility, barrenness, self-loathing, with only every evil incident to human nature."

". . . The paths of Vice are sometimes strew'd with roses, but then they are forever infamous for many a thorn, for many a cankerworm: those of Virtue are strew'd with roses purely, and those eternally unfading ones. [Footnote 2/2]"

In 1963, an American publishing house undertook the publication of *Memoirs*. The record

indicates that an unusually large number of orders were placed by universities and libraries; the Library of Congress requested the

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right to translate the book into Braille. But the Commonwealth of Massachusetts instituted the suit that ultimately found its way here, praying that the book be declared obscene so that the citizens of Massachusetts might be spared the necessity of determining for themselves whether or not to read it.

The courts of Massachusetts found the book "obscene" and upheld its suppression. This Court reverses, the prevailing opinion having seized upon language in the opinion of the Massachusetts Supreme Judicial Court in which it is candidly admitted that *Fanny Hill* has at least "some minimal literary value." I do not believe that the Court should decide this case on so disingenuous a basis as this. I base my vote to reverse on my view that the First Amendment does not permit the censorship of expression not brigaded with illegal action. But even applying the prevailing view of the *Roth* test, reversal is compelled by this record, which makes clear that *Fanny Hill* is not "obscene." The prosecution made virtually no effort to prove that this book is "utterly without redeeming social importance." The defense, on the other hand, introduced considerable and impressive testimony to the effect that this was a work of literary, historical, and social importance. [Footnote 2/3]

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We are judges, not literary experts or historians or philosophers. We are not competent to render an independent judgment as to the worth of this or any other book, except in our capacity as private citizens. I would pair my Brother CLARK on *Fanny Hill* with the Universalist minister I quote in the 383 U.S. 413app2|>Appendix. If there is to be censorship, the wisdom of experts on such matters as literary merit and historical significance must be evaluated. On this record, the Court has no choice but to reverse the judgment of the Massachusetts Supreme Judicial Court, irrespective of whether we would include *Fanny Hill* in our own libraries.

Four of the seven Justices of the Massachusetts Supreme Judicial Court conclude that *Fanny Hill* is obscene. 349 Mass. 69, 206 N.E.2d 403. Four of the seven judges of the New York Court of Appeals conclude that it is not obscene. *Larkin v. Putnam's Sons*, 14 N.Y.2d 399, 200 N.E.2d 760. To outlaw the book on such a voting record would be to let majorities rule where minorities were thought to be supreme. The Constitution forbids abridgment of "freedom of speech, or of the press." Censorship is the most notorious form of abridgment. It substitutes majority rule where minority tastes or viewpoints were to be tolerated.

It is to me inexplicable how a book that concededly has social worth can nonetheless be banned because of the manner in which it is advertised and sold. However florid its cover, whatever the pitch of its advertisements, the contents remain the same.

Every time an obscenity case is to be argued here, my office is flooded with letters and postal cards urging me

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to protect the community or the Nation by striking down the publication. The messages are often identical even down to commas and semicolons. The inference is irresistible that they were all copied from a school or church blackboard. Dozens of postal cards often are mailed from the same precinct. The drives are incessant, and the pressures are great. Happily, we do not bow to them. I mention them only to emphasize the lack of popular understanding of our constitutional system. Publications and utterances were made immune from majoritarian control by the First Amendment, applicable to the States by reason of the Fourteenth. No exceptions were made, not even for obscenity. The Court's contrary conclusion in *Roth*, where obscenity was found to be "outside" the First Amendment, is without justification.

The extent to which the publication of "obscenity" was a crime at common law is unclear. It is generally agreed that the first reported case involving obscene conduct is *The King v. Sir Charles Sedley*. [Footnote 2/4] Publication of obscene literature, at first thought to be the exclusive concern of the ecclesiastical courts. [Footnote 2/5] was not held to constitute an indictable offense until 1727. [Footnote 2/6] A later case involved the publication of an "obscene and

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impious libel" (a bawdy parody of Pope's "Essay on Man") by a member of the House of Commons. [Footnote 2/7] On the basis of these few cases, one cannot say that the common law doctrines with regard to publication of obscenity were anything but uncertain.

"There is no definition of the term. There is no basis of identification. There is no unity in describing what is obscene literature, or in prosecuting it. There is little more than the ability to smell it."

Alpert, Judicial Censorship of Obscene Literature, 52 Harv.L.Rev. 40, 47 (1938).

But even if the common law had been more fully developed at the time of the adoption of

the First Amendment, we would not be justified in assuming that the Amendment left the common law unscathed. In *Bridges v. California*, 314 U. S. 252, 314 U. S. 264, we said:

"[T]o assume that English common law in this field became ours is to deny the generally accepted historical belief that 'one of the objects of the Revolution was to get rid of the English common law on liberty of speech and of the press.'"

Schofield, *Freedom of the Press in the United States*, 9 Publications Amer.Sociol.Soc., 67, 76.

"More specifically, it is to forget the environment in which the First Amendment was ratified. In presenting the proposals which were later embodied in the Bill of Rights, James Madison, the leader in the preparation of the First Amendment, said:"

"Although I know whenever the great rights, the trial by jury, freedom of the press, or liberty of conscience, come in question in that body [Parliament],

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the invasion of them is resisted by able advocates, yet their Magna Charta does not contain any one provision for the security of those rights, respecting which the people of America are most alarmed. The freedom of the press and rights of conscience, those choicest privileges of the people, are unguarded in the British Constitution."

And see Grosjean v. American Press Co., 297 U. S. 233, 297 U. S. 248-249.

It is true, as the Court observed in *Roth*, that obscenity laws appeared on the books of a handful of States at the time the First Amendment was adopted. [Footnote 2/8] But the First Amendment was, until the adoption of the Fourteenth, a restraint only upon federal power. Moreover, there is an absence of any federal cases or laws relative to obscenity in the period immediately after the adoption of the First Amendment. Congress passed no legislation relating to obscenity until the middle of the nineteenth century. [Footnote 2/9] Neither reason nor history warrants exclusion of any particular class of expression from the protection of the First Amendment on nothing more than a judgment that it is utterly without merit. We faced the difficult questions the First Amendment poses with regard to libel in *New York Times v. Sullivan*,

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376 U. S. 254, 376 U. S. 269, where we recognized that "libel can claim no talismanic immunity from constitutional limitations." We ought not to permit fictionalized assertions of

constitutional history to obscure those questions here. Were the Court to undertake that inquiry, it would be unable, in my opinion, to escape the conclusion that no interest of society with regard to suppression of "obscene" literature could override the First Amendment to justify censorship.

The censor is always quick to justify his function in terms that are protective of society. But the First Amendment, written in terms that are absolute, deprives the States of any power to pass on the value, the propriety, or the morality of a particular expression. *Cf. Kingsley Int'l Pictures Corp. v. Regents*, 360 U. S. 684, 360 U. S. 688-689; *Joseph Burstyn, Inc. v. Wilson*, 343 U. S. 495. Perhaps the most frequently assigned justification for censorship is the belief that erotica produce antisocial sexual conduct. But that relationship has yet to be proven. [Footnote 2/10] Indeed, if one were to make judgments on the

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basis of speculation, one might guess that literature of the most pornographic sort would, in many cases, provide a substitute -- not a stimulus -- for antisocial sexual conduct. *See* Murphy, *The Value of Pornography*, 10 Wayne L.Rev. 655, 661 and n.19 (1964). As I read the First Amendment, judges cannot gear the literary diet of an entire nation to whatever tepid stuff is incapable of triggering the most demented mind. The First Amendment demands more than a horrible example or two of the perpetrator of a crime of sexual violence, in whose pocket is found a pornographic book, before it allows the Nation to be saddled with a regime of censorship. [Footnote 2/11]

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Whatever may be the reach of the power to regulate *conduct*, I stand by my view in *Roth v. United States*, *supra*, that the First Amendment leaves no power in government over *expression of ideas*.

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APPENDIX TO OPINION OF

MR. JUSTICE DOUGLAS, CONCURRING

DR. PEALE AND FANNY HILL

An Address by

Rev. John R. Graham, First Universalist Church of Denver

December 1965.

* * * *

At the present point in the twentieth century, it seems to me that there are two books which symbolize the human quest for what is moral. *Sin, Sex and Self-Control* by Dr. Norman Vincent Peale, the well known clergyman of New York City, portrays the struggle of contemporary middle-class society to arrive at a means of stabilizing behavior patterns. At the same time, there is a disturbing book being sold in the same stores with Dr. Peale's volume. It is a seventeenth century English novel by John Cleland, and it is known as *Fanny Hill: The Memoirs of a Woman of Pleasure*.

Quickly, it must be admitted that it appears that the two books have very little in common. One was written in a day of scientific and technological sophistication, while the other is over two hundred years old. One is acclaimed in the pulpit, while the other is protested before the United States Supreme Court. *Sin, Sex and Self-Control* is authored by a Christian pastor, while

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Fanny Hill represents thoughts and experiences of a common prostitute. As far as the general public seems to be concerned, one is moral and the other is hopelessly immoral. While Dr. Peale is attempting to redeem the society, most people believe that *Fanny Hill* can only serve as another instance in an overall trend toward an immoral social order. Most parents would be pleased to find their children reading a book by Dr. Peale, but I am afraid that the same parents would be sorely distressed to discover a copy of *Fanny Hill* among the school books of their offspring.

Although one would not expect to find very many similarities between the thoughts of a pastor and those of a prostitute, the subject matter of the two books is, in many ways, strangely similar. While the contents are radically different, the concerns are the same. Both authors deal with human experience. They are concerned with people and what happens to them in the world in which they live each day. But most significantly of all, both books deal with the age-old question of "What is moral?" I readily admit that this concern with the moral is more obvious in Dr. Peale's book than it is in the one by John Cleland. The search for the moral in *Fanny Hill* is clothed in erotic passages which seem to equate morality with debauchery as far as the general public is concerned. At the same time, Dr. Peale's book is punctuated with such noble terms as "truth," "love," and "honesty."

These two books are not very important in themselves. They may or may not be great

literature. Whether they will survive through the centuries to come is a question, although John Cleland has an historical edge on Norman Vincent Peale. However, in a symbolic way, they do represent the struggle of the moral quest, and for this reason they are important.

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Dr. Peale begins his book with an analysis of contemporary society in terms of the moral disorder which is more than obvious today. He readily admits that the traditional Judeo-Christian standards of conduct and behavior no longer serve as strong and forceful guides. He writes:

"For more than forty years, ever since my ordination, I had been preaching that, if a person would surrender to Jesus Christ and adopt strong affirmative attitudes toward life, he would be able to live abundantly and triumphantly. I was still absolutely convinced that this was true. But I was also bleakly aware that the whole trend in the seventh decade of the twentieth century seemed to be away from the principles and practices of religion -- not toward them."

(Page 1)

Dr. Peale then reflects on the various changes that have taken place in our day and suggests that, although he is less than enthusiastic about the loss of allegiance to religion, he is, nevertheless, willing to recognize that one cannot live by illusion.

After much struggle, Dr. Peale then says that he was able to develop a new perspective on the current moral dilemma of our times. What first appeared to be disaster was really opportunity. Such an idea, coming from him, should not be very surprising, since he is more or less devoted to the concept of "positive thinking!" He concludes that our society should welcome the fact that the old external authorities have fallen. He does not believe that individuals should ever be coerced into certain patterns of behavior.

According to Dr. Peale, we live in a day of challenge. Our society has longed for a time when individuals would be disciplined by self control, rather than being motivated by external compunction. Bravely and forthrightly,

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he announces that the time has now come when self-control can and must replace external authority. He is quick to add that the values contained in the Judeo-Christian tradition and "the American way of life" must never be abandoned, for they emanate from the wellsprings of "Truth." What has previously been only an external force must now be

responsibility of a man. That has previously been only an external force must now be internalized by individuals.

In many ways, Dr. Peale's analysis of the social situation and the solution he offers for assisting the individual to stand against the pressures of the times, come very close to the views of Sigmund Freud. He felt that society could and would corrupt the individual and, as a result, the only sure defense was a strong super-ego or conscience. This is precisely what Dr. Peale recommends.

Interestingly enough, John Cleland, in *Fanny Hill*, is concerned with the same issues. Although the question of moral behavior is presented more subtly in his book, the problem with which he deals is identical. There are those who contend that the book is wholly without redeeming social importance. They feel that it appeals only to prurient interests.

I firmly believe that *Fanny Hill* is a moral, rather than an immoral, piece of literature. In fact, I will go as far as to suggest that it represents a more significant view of morality than is represented by Dr. Peale's book *Sin, Sex and Self-Control*. As is Dr. Peale, Cleland is concerned with the nature of the society and the relationship of the individual to it. *Fanny Hill* appears to me to be an allegory. In the story, the immoral becomes the moral and the unethical emerges as the ethical. Nothing is more distressing than to discover that what is commonly considered to be evil may, in reality, demonstrate characteristics of love and concern.

There is real irony in the fact that Fanny Hill, a rather naive young girl who becomes a prostitute, finds warmth,

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understanding and the meaning of love and faithfulness amid surroundings and situations which the society, as a whole, condemns as debased and depraved. The world outside the brothel affirms its faith in the dignity of man, but people are often treated as worthless and unimportant creatures. However, within the world of prostitution, Fanny Hill finds friendship, understanding, respect, and is treated as a person of value. When her absent lover returns, she is not a lost girl of the gutter. One perceives that she is a whole and healthy person who has discovered the ability to love and be loved in a brothel.

I think Cleland is suggesting that one must be cautious about what is condemned and what is held in honor. From Dr. Peale's viewpoint, the story of Fanny Hill is a tragedy because she did not demonstrate self-control. She refused to internalize the values inherent in the Judeo-Christian tradition and the catalog of sexual scenes in the book, fifty-two in all, are a symbol of the debased individual and the society in which he lives.

Dr. Peale and others, would be correct in saying that Fanny Hill did not demonstrate self-control. She did, however, come to appreciate the value of self-expression. At no time were her "clients" looked upon as a means to an end. She tried and did understand them, and she was concerned about them as persons. When her lover, Charles, returned, she was not filled with guilt and remorse. She accepted herself as she was, and was able to offer him her love and devotion.

I have a feeling that many people fear the book *Fanny Hill* not because of its sexual scenes, but because the author raises serious question with the issue of what is moral and what is immoral. He takes exception to the idea that repression and restraint create moral individuals. He develops the thought that self-expression is more human than self-control. And he dares to suggest that, in a situation which society calls immoral and

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debased, a genuine love and respect for life and for people, as human beings, can develop. Far from glorifying vice, John Cleland points an accusing finger at the individual who is so certain as to what it means to be a moral man.

There are those who will quickly say that this "message" will be missed by the average person who reads *Fanny Hill*. But this is precisely the point. We become so accustomed to prejudging what is ethical and what is immoral that we are unable to recognize that what we accept as good may be nothing less than evil because it harms people.

I know of no book which more beautifully describes meaningful relationships between a man and a woman than does *Fanny Hill*. In many marriages, men use a woman for sexual gratification and otherwise, as well as vice versa. But this is not the case in the story of *Fanny Hill*. The point is simply that there are many, many ways in which we hurt, injure and degrade people that are far worse than either being or visiting a prostitute. We do this all in the name of morality.

At the same time that Dr. Peale is concerned with sick people, John Cleland attempts to describe healthy ones. *Fanny Hill* is a more modern and certainly more valuable book than *Sin, Sex and Self-Control* because the author does not tell us how to behave, but attempts to help us understand ourselves and the nature of love and understanding in being related to other persons. Dr. Peale's writing emphasizes the most useful commodities available to man -- self-centeredness and self-control. John Cleland suggests that self-understanding and self-expression may not be as popular, but they are more humane.

The "Peale approach" to life breeds contentment, for it suggests that each one of us can be certain as to what is good and true. Standards for thinking and behavior are available and all we need to do is appropriate them

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for our use. In a day when life is marked by chaos and confusion, this viewpoint offers much in the way of comfort and satisfaction. There is only one trouble with it, however, and that is that it results in conformity, rigid behavior, and a lack of understanding. It results in personality configurations that are marked with an intense interest in propositions about Truth and Right but, at the same time, build a wall against people. Such an attitude creates certainty, but there is little warmth. The idea develops that there are "my kind of people" and they are "right." It forces us to degrade, dismiss and ultimately attempt to destroy anyone who does not agree with us.

To be alive and sensitive to life means that we have to choose what we want. There is no possible way for a person to be a slave and free at the same time. Self-control and self-expression are at opposite ends of the continuum. As much as some persons would like to have both, it is necessary to make a choice, since restraint and openness are contradictory qualities. To internalize external values denies the possibility of self-expression. We must decide what we want, when it comes to conformity and creativity. If we want people to behave in a structured and predictable manner, then the ideal of creativity cannot have meaning.

* * * *

Long ago Plato said, "What is honored in a country will be cultivated there." More and more, we reward people for thinking alike and as a result, we become frightened, beyond belief, of those who take exception to the current consensus. If our society collapses, it will not be because people read a book such as *Fanny Hill*. It will fall because we will have refused to understand it. Decadence, in a nation or an individual, arises not because there is a lack of ability to distinguish between morality and immorality, but because the opportunity

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for self-expression has been so controlled or strangled that the society or the person becomes a robot.

The issue which a Dr. Peale will never understand, because he is a victim of it himself, and which John Galsworthy describes with brilliant clarity and sensitive perception, is that condition

which John Cleland describes with brilliant clarity and sensitive persuasion, is that, until we learn to respect ourselves enough that we leave each other alone, we cannot discover the meaning of morality.

Dr. Peale and *Fanny Hill* offer the two basic choices open to man. Man is free to choose an autocentric existence which is marked by freedom from ambiguity and responsibility. Autocentricity presupposes a "closed world" where life is predetermined and animal-like. In contrast to this view, there is the allocentric outlook, which is marked by an "open encounter of the total person with the world." Growth, spontaneity and expression are the goals of such an existence.

Dr. Peale epitomizes the autocentric approach. He offers "warm blankets" and comfortable "cocoons" for those who want to lose their humanity. On the other hand, *Fanny Hill* represents the allocentric viewpoint which posits the possibility for man to raise his sights, stretch his imagination, cultivate his sensitiveness as well as deepen and broaden his perspectives. In discussing the autocentric idea, Floyd W. Matson writes,

"Human beings conditioned to apathy and affluence may well prefer this regressive path of least resistance, with its promise of escape from freedom and an end to striving. But we know at least that it is open to them to choose otherwise: in a word, to choose themselves."

(*The Broken Image*, page 193.)

In a day when people are overly sensitive in drawing lines between the good and the bad, the right and the wrong, as well as the true and the false, it seems to me

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that there is great irony in the availability of a book such as *Fanny Hill*. Prostitution may be the oldest profession in the world, but we are ever faced with a question which is becoming more and more disturbing: "What does a prostitute look like?"

[Footnote 2/1]

Memoirs was the subject of what is generally regarded as the first recorded suppression of a literary work in this country on grounds of obscenity. See *Commonwealth v. Holmes*, 17 Mass. 336 (1821). The edition there condemned differed from the present volume in that it contained apparently erotic illustrations.

[Footnote 2/2]

Memoirs, at 213-214 (Putnam ed.1963).

[Footnote 2/3]

The defense drew its witnesses from the various colleges located within the Commonwealth of Massachusetts. These included: Fred Holly Stocking, Professor of English and Chairman of the English Department, Williams College; Tohn M. Bullitt, Professor of English and Master of Quincy House, Harvard College; Robert H. Sproat, Associate Professor of English Literature, Boston University; Norman N. Holland, Associate Professor of English, Massachusetts Institute of Technology, and Ira Konigsberg, Assistant Professor of English and American Literature, Brandeis University.

In addition, the defense introduced into evidence reviews of impartial literary critics. These are, in my opinion, of particular significance, since their publication indicates that the book is of sufficient significance as to warrant serious critical comment. The reviews were by U.S. Pritchett, *New York Review of Books*, p. 1 (Oct. 31, 1963); Brigid Brophy, *New Statesman*, p. 710 (Nov. 15 1963), and J. Donald Adams, *New York Times Book Review*, p 2 (July 28, 1963). And the 383 U.S. 413app2|>Appendix to this opinion contains another contemporary view.

[Footnote 2/4]

There are two reports of the case. The first is captioned *Le Roy v. Sr. Charles Sidney*, 1 Sid. 168, pl. 29 (K.B. 1663); the second is titled *Sir Charles Sydlyes Case*, 1 Keble 620 (K.B. 1663). Sir Charles had made a public appearance on a London balcony while nude, intoxicated, and talkative. He delivered a lengthy speech to the assembled crowd, uttered profanity, and hurled bottles containing what was later described as an "offensive liquor" upon the crowd. The proximate source of the "offensive liquor" appears to have been Sir Charles. Alpert, *Judicial Censorship of Obscene Literature*, 52 Harv.L.Rev. 40-43 (1938).

[Footnote 2/5]

The Queen v. Read, 11 Mod. 142 (Q.B. 1707).

[Footnote 2/6]

Dominus Rex v. Curl, 2 Strange 789 (K.B. 1727). See Stralls, *The Unspeakable Curll* (1927).

[Footnote 2/7]

Rex v. Tilkes, 4 Burr. 2527 (K.B. 1770). The prosecution of Wilkes was a highly political action, for Wilkes was an outspoken critic of the government. See R. W. Postgate, *That*

Devil Wilkes (1929). It has been suggested that the prosecution in this case was a convenient substitute for the less attractive charge of seditious libel. *See* Alpert, *supra*, at 45.

[Footnote 2/8]

See 354 U.S. at 354 U. S. 483 and n. 13. For the most part, however, the early legislation was aimed at blasphemy and profanity. *See* 354 U.S. at 354 U. S. 482-483 and n. 12. The first reported decision involving the publication of obscene literature does not come until 1821. *See Commonwealth v. Holmes*, 17 Mass. 336. It was not until after the Civil War that state prosecutions of this sort became commonplace. *See* Lockhart & McClure, Literature, The Law of Obscenity, and the Constitution, 38 Minn.L.Rev. 295, 324-325 (1954).

[Footnote 2/9]

Tariff Act of 1842, c. 270, § 28, 5 Stat. 566 (prohibiting importation of obscene "prints"). Other federal legislation followed; the development of federal law is traced in Cairns, Paul, & Wishner, Sex Censorship: The Assumptions of Anti-Obscenity Laws and the Empirical Evidence, 46 Minn.L.Rev. 1009, 1010 n. 2 (1962).

[Footnote 2/10]

See Cairns, Paul Wishner, *supra*, 1031041; Lockhart & McClure, *supra*, at 382-387. *And see* the summary of Dr. Jahoda's studies prepared by her for Judge Frank, reprinted in *United States v. Roth*, 237 F.2d 796, 815-816 (concurring opinion). Those who are concerned about children and erotic literature would do well to consider the counsel of Judge Bok:

"It will be asked whether one would care to have one's young daughter read these books. I suppose that, by the time she is old enough to wish to read them, she will have learned the biologic facts of life and the words that go with them. There is something seriously wrong at home if those facts have not been met and faced and sorted by then; it is not children so much as parents that should receive our concern about this. I should prefer that my own three daughters meet the facts of life and the literature of the world in my library than behind a neighbor's barn, for I can face the adversary there directly. If the young ladies are appalled by what they read, they can close the book at the bottom of page one; if they read further, they will learn what is in the world and in its people, and no parents who have been discerning with their children need fear the outcome. Nor can they hold it back, for life is a series of little battles and minor issues, and the burden of choice is on us all, every day, young and old."

Commonwealth v. Gordon, 66 Pa.D. & C. 101, 110.

[Footnote 2/11]

It would be a futile effort even for a censor to attempt to remove all that might possibly stimulate antisocial sexual conduct:

"The majority [of individuals], needless to say, are somewhere between the over-scrupulous extremes of excitement and frigidity. . . . Within this variety, it is impossible to define 'hard-core' pornography, as if there were some singly lewd concept from which all profane ideas passed by imperceptible degrees into that sexuality called holy. But there is no 'hard-core.' Everything, ever idea, is capable of being obscene if the personality perceiving it so apprehends it."

"It is for this reason that books, pictures, charades, ritual, the spoken word, can and do lead directly to conduct harmful to the self indulging in it and to others. Heinrich Pommerenke, who was a rapist, abuser, and mass slayer of women in Germany, was prompted to his series of ghastly deeds by Cecil B. DeNille's *The Ten Commandments*. During the scene of the Jewish women dancing about the Golden Calf, all the doubts of his life came clear: Women were the source of the world's trouble, and it was his mission to both punish them for this and to execute them. Leaving the theater, he slew his first victim in a park nearby. John George Haigh, the British vampire who sucked his victims' blood through soda straws and dissolved their drained bodies in acid baths, first had his murder-inciting dreams and vampire-longings from watching the 'voluptuous' procedure of -- an Anglican High Church Service!"

Murphy, *supra*, at 668.

MR. JUSTICE CLARK, dissenting.

It is with regret that I write this dissenting opinion. However, the public should know of the continuous flow of pornographic material reaching this Court and the increasing problem States have in controlling it. *Memoirs of a Woman of Pleasure*, the book involved here, is typical. I have "stomached" past cases for almost 10 years without much outcry. Though I am not known to be a purist -- or a shrinking violet -- this book is too much even for me. It is important that the Court has refused to declare it obscene and thus affords it further circulation. In order to give my remarks the proper setting, I have been obliged to portray the book's contents, which causes me embarrassment. However, quotations from typical episodes would so debase our Reports that I will not follow that course.

I

Let me first pinpoint the effect of today's holding in the obscenity field. While there is no majority opinion in this case, there are three Justices who import a new test into that laid down in *Roth v. United States*, 354 U. S. 476 (1957), namely, that "[a] book cannot be proscribed unless it is found to be utterly without redeeming social value." I agree with my Brother WHITE that such a condition rejects the basic holding of *Roth* and gives the smut artist free rein to carry on his dirty business. My vote in that case -- which was the deciding one for the majority opinion -- was cast solely because the Court declared the test of obscenity to be:

"whether, to

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the average person, applying contemporary community standards, the dominant theme of the material, taken as a whole, appeals to prurient interest."

I understood that test to include only two constitutional requirements: (1) the book must be judged as a whole, not by its parts, and (2) it must be judged in terms of its appeal to the prurient interest of the average person, applying contemporary community standards. [Footnote 3/1] Indeed, obscenity was denoted in *Roth* as having

"such slight social value as a step to truth that any benefit that may be derived . . . is clearly outweighed by the social interest in order and morality. . . ."

At 354 U. S. 485 (quoting *Chaplinsky v. New Hampshire*, 315 U. S. 568, 315 U. S. 572 (1942)). Moreover in no subsequent decision of this Court has any "utterly without redeeming social value" test been suggested, much less expounded. My Brother HARLAN, in *Manual Enterprises, Inc. v. Day*, 370 U. S. 478 (1962), made no reference whatever to such a requirement in *Roth*. Rather, he interpreted *Roth* as including a test of "patent offensiveness," besides "prurient appeal." Nor did my Brother BRENNAN, in his concurring opinion in *Manual Enterprises*, mention any "utterly without redeeming social value" test. The first reference to such a test was made by my Brother BRENNAN in *Jacobellis v. Ohio*, 378 U. S. 184, 378 U. S. 191 (1964), seven years after *Roth*. In an opinion joined only by Justice Goldberg, he there wrote:

"Recognizing that the test for obscenity enunciated [in *Roth*] . . . is not perfect, we think any substitute would raise equally difficult problems, and we therefore adhere to that standard."

Nevertheless, he proceeded to add:

"We would reiterate, however, our recognition in *Roth* that obscenity is excluded from the constitutional protection only because it is 'utterly without redeeming social importance,'"

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This language was then repeated in the converse to announce this *non sequitur*:

"It follows that material dealing with sex in a manner that advocates ideas . . . or that has literary or scientific or artistic value or any other form of social importance, may not be branded as obscenity and denied the constitutional protection."

At 378 U. S. 191. Significantly no opinion in *Jacobellis*, other than that of my Brother BRENNAN, mentioned the "utterly without redeeming social importance" test which he there introduced into our many and varied previous opinions in obscenity cases. Indeed, rather than recognizing the "utterly without social importance" test, THE CHIEF JUSTICE in his dissent in *Jacobellis*, which I joined, specifically stated:

"In light of the foregoing, I would reiterate my acceptance of the rule of the *Roth* case: *material is obscene and not constitutionally protected against regulation and proscription* if 'to the average person, applying contemporary community standards the dominant theme of the material taken as a whole appeals to prurient interest.'"

(Emphasis added.) At 378 U. S. 202. THE CHIEF JUSTICE and I further asserted that the enforcement of this rule should be committed to the state and federal courts whose judgments made pursuant to the *Roth* rule, we would accept, limiting our review to a consideration of whether there is "sufficient evidence" in the record to support a finding of obscenity. At 378 U. S. 202.

II

Three members of the majority hold that reversal here is necessary solely because their novel "utterly without redeeming social value" test was not properly interpreted or applied by the Supreme Judicial Court of Massachusetts.

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Massachusetts now has to retry the case although the "Findings of Fact, Rulings of Law and Order for Final Decree" of the trial court specifically held that

"this book is 'utterly without redeeming social importance' in the fields of art, literature, science, news or ideas of any social importance, and that it is obscene, indecent and impure."

I quote portions of the findings:

"Opinions of experts are admitted in evidence to aid the Court in its understanding and comprehension of the facts, but, of course, an expert cannot usurp the function of the Court. Highly artificial, stylistic writing and an abundance of metaphorical descriptions are contained in the book, but the conclusions of some experts were pretty well strained in attempting to justify its claimed literary value: such as the book preached a moral that sex with love is better than sex without love, when Fanny's description of her sexual acts, particularly with the young boy she seduced, in Fanny's judgment at least, was to the contrary. *Careful review of all the expert testimony has been made*, but, the best evidence of all, is the book itself, and it plainly has no value because of ideas, news or artistic, literary or scientific attributes. . . . Nor does it have any other merit. 'This Court will not adopt a rule of law which states obscenity is suppressible, but well written obscenity is not.' Mr. Justice Scileppi in *People v. Fritch*, 13 N.Y.2d 119."

(Emphasis added.) Finding 20. None of these findings of the trial court were overturned on appeal, although the Supreme Judicial Court of Massachusetts observed in addition that

"the fact that the testimony may indicate this book has some minimal literary value does not mean it is of any social importance. We do not interpret the 'social importance' test as requiring

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that a book which appeals to prurient interest and is patently offensive must be unqualifiedly worthless before it can be deemed obscene."

My Brother BRENNAN reverses on the basis of this casual statement, despite the specific findings of the trial court. Why, if the statement is erroneous, Brother BRENNAN does not affirm the holding of the trial court which beyond question is correct, one cannot tell. This course has often been followed in other cases.

In my view, evidence of social importance is relevant to the determination of the ultimate question of obscenity. But social importance does not constitute a separate and distinct constitutional test. Such evidence must be considered together with evidence that the material in question appeals to prurient interest and is patently offensive. Accordingly, we must first turn to the book here under attack. I repeat that I regret having to deny the

must first turn to the book here under attack. I repeat that I regret having to depict the sordid episodes of this book.

III

Memoirs is nothing more than a series of minutely and vividly described sexual episodes. The book starts with Fanny Hill, a young 15-year-old girl, arriving in London to seek household work. She goes to an employment office where, through happenstance, she meets the mistress of a bawdy house. This takes 10 pages. The remaining 200 pages of the book detail her initiation into various sexual experiences, from a lesbian encounter with a sister prostitute to all sorts and types of sexual debauchery in bawdy houses and as the mistress of a variety of men. This is presented to the reader through an uninterrupted succession of descriptions by Fanny, either as an observer or participant. of sexual adventures so vile that one of the male expert witnesses in the case was hesitant to repeat any one of them in the courtroom.

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These scenes run the gamut of possible sexual experience such as lesbianism, female masturbation, homosexuality between young boys, the destruction of a maidenhead with consequent gory descriptions, the seduction of a young virgin boy, the flagellation of male by female, and vice versa, followed by fervid sexual engagement, and other abhorrent acts, including over two dozen separate bizarre descriptions of different sexual intercourses between male and female characters. In one sequence, four girls in a bawdy house are required in the presence of one another to relate the lurid details of their loss of virginity and their glorification of it. This is followed the same evening by "publick trials" in which each of the four girls engages in sexual intercourse with a different man while the others witness, with Fanny giving a detailed description of the movement and reaction of each couple.

In each of the sexual scenes, the exposed bodies of the participants are described in minute and individual detail. The pubic hair is often used for a background to the most vivid and precise descriptions of the response, condition, size, shape, and color of the sexual organs before, during and after orgasms. There are some short transitory passages between the various sexual episodes, but, for the most part, they only set the scene and identify the participants for the next orgy, or make smutty reference and comparison to past episodes.

There can be no doubt that the whole purpose of the book is to arouse the prurient interest. Likewise the repetition of sexual episode after episode and the candor with which they are described renders the book "patently offensive." These facts weigh heavily in any appraisal of the book's claims to "redeeming social importance "

Let us now turn to evidence of the book's alleged social value. While unfortunately the State offered little testimony, [Footnote 3/2]

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the defense called several experts to attest that the book has literary merit and historical value. A careful reading of testimony, however, reveals that it has no substance. For example, the first witness testified:

"I think it is a work of art . . . ; it asks for and receives a literary response . . . presented in an orderly and organized fashion, with a fictional central character, and with a literary style. . . . I think the central character is . . . what I call an intellectual . . . , someone who is extremely curious about life and who seeks . . . to record with accuracy the details of the external world, physical sensations, psychological responses . . . , an empiricist. . . . I find that this tells me things . . . about the 18th century that I might not otherwise know."

If a book of art is one that asks for and receives a literary response, *Memoirs* is no work of art. The sole response evoked by the book is sensual. Nor does the orderly presentation of *Memoirs* make a difference; it presents nothing but lascivious scenes organized solely to arouse prurient interest and produce sustained erotic tension. [Footnote 3/3] Certainly the book's baroque style cannot vitiate the determination of obscenity. From a legal standpoint, we must remember that obscenity is no less obscene though it be expressed in "elaborate language." Indeed, the more meticulous its presentation, the more it appeals to the prurient interest. To say that Fanny is an "intellectual" is an insult to those who travel under that tag.

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She was nothing but a harlot -- a sensualist -- exploiting her sexual attractions which she sold for fun, for money, for lodging and keep, for an inheritance, and finally for a husband. If she was curious about life, her curiosity extended only to the pursuit of sexual delight wherever she found it. The book describes nothing in the "external world" except bawdy houses and debaucheries. As an empiricist, Fanny confines her observations and "experiments" to sex, with primary attention to depraved, lewd, and deviant practices.

Other experts produced by the defense testified that the book emphasizes the profound "idea that a sensual passion is only truly experienced when it is associated with the emotion of love" and that the sexual relationship "can be a wholesome, healthy, experience itself," whereas in certain modern novels "the relationship between the sexes is seen as another

manifestation of modern decadence, infertility or perversion." In my view, this proves nothing as to social value. The state court properly gave such testimony no probative weight. A review offered by the defense noted that

"where 'pornography' does not brutalize, it idealizes. The book is, in this sense, an erotic fantasy -- and a male fantasy, at that, put into the mind of a woman. The male organ is phenomenal to the point of absurdity."

Finally, it saw the book as

"a minor fantasy, deluding as a guide to conduct, but respectful of our delight in the body . . . , an interesting footnote in the history of the English novel."

These unrelated assertions reveal to me nothing whatever of literary, historical, or social value. Another review called the book "a great novel . . . , one which turns its convention upside down. . . ." Admittedly Cleland did not attempt "high art," because he was writing "an erotic novel. He can skip the elevation and get on with the erections." Fanny's "downfall" is seen as "one long delightful swoon into the depths of pleasurable sensation."

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Rather than indicating social value in the book, this evidence reveals just the contrary. Another item offered by the defense described *Memoirs* as being "widely accredited as the first deliberately dirty novel in English." However, the reviewer found Fanny to be

"no common harlot. Her 'Memoirs' combine literary grace with a disarming enthusiasm for an activity which is, after all, only human. What is more, she never uses a dirty word."

The short answer to such "expertise" is that none of these so-called attributes have any value to society. On the contrary, they accentuate the prurient appeal.

Another expert described the book as having "detectable literary merit," since it reflects "an effort to interpret a rather complex character . . . going through a number of very different adventures." To illustrate his assertion that the "writing is very skillfully done" this expert pointed to the description of a whore, "Phoebe, who is *red-faced, fat and in her early 50's, who waddles into a room.*' *She doesn't walk in, she waddles in.*" *Given this standard for "skillful writing," it is not surprising that he found the book to have merit.*

The remaining experts testified in the same manner, claiming the book to be a "record of the historical, psychological, [and] social events of the period." One has but to read the history of the 18th century to disprove this assertion. The story depicts nothing besides the

brothels that are present in metropolitan cities in every period of history. One expert noticed "in this book a tendency away from nakedness during the sexual act which I find an interesting sort of sociological observation" on tastes different from contemporary ones. As additional proof, he marvels that Fanny

"refers constantly to the male sexual organ as an engine . . . which is pulling you away from the way these events would be described in the 19th or 20th century."

How this adds social value to the book

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is beyond my comprehension. It only indicates the lengths to which these experts go in their effort to give the book some semblance of value. For example, the ubiquitous descriptions of sexual acts are excused as being necessary in tracing the "moral progress" of the heroine, and the giving of a silver watch to a servant is found to be "an odd and interesting custom that I would like to know more about." This only points up the bankruptcy of *Memoirs* in both purpose and content, adequately justifying the trial court's finding that it had absolutely no social value.

It is, of course, the duty of the judge or the jury to determine the question of obscenity, viewing the book by contemporary community standards. It can accept the appraisal of experts or discount their testimony in the light of the material itself or other relevant testimony. So-called "literary obscenity," *i.e.*, the use of erotic fantasies of the hard-core type clothed in an engaging literary style has no constitutional protection. If a book deals solely with erotic material in a manner calculated to appeal to the prurient interest, it matters not that it may be expressed in beautiful prose. There are obviously dynamic connections between art and sex -- the emotional, intellectual, and physical -- but where the former is used solely to promote prurient appeal, it cannot claim constitutional immunity. Cleland uses this technique to promote the prurient appeal of *Memoirs*. It is true that Fanny's perverse experiences finally bring from her the observation that "the heights of [sexual] enjoyment cannot be achieved until true affection prepares the bed of passion." But this merely emphasizes that sex, wherever and however found, remains the sole theme of *Memoirs*. In my view, the book's repeated and unrelieved appeals to the prurient interest of the average person leave it utterly without redeeming social importance.

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IV

In his separate concurrence, my Brother DOUGLAS asserts there is no proof that obscenity

produces antisocial conduct. I had thought that this question was foreclosed by the determination in *Roth* that obscenity was not protected by the First Amendment. I find it necessary to comment upon Brother DOUGLAS' views, however, because of the new requirement engrafted upon *Roth* by Brother BRENNAN, *i.e.*, that material which "appeals to a prurient interest" and which is "patently offensive" may still not be suppressed unless it is "utterly without redeeming social value." The question of antisocial effect thus becomes relevant to the more limited question of social value. Brother BRENNAN indicates that the social importance criterion encompasses only such things as the artistic, literary, and historical qualities of the material. But the phrasing of the "utterly without redeeming social value" test suggests that other evidence must be considered. To say that social value may "redeem" implies that courts must balance alleged esthetic merit against the harmful consequences that may flow from pornography. Whatever the scope of the social value criterion -- which need not be defined with precision here -- it at least anticipates that the trier of fact will weigh evidence of the material's influence in causing deviant or criminal conduct, particularly sex crimes, as well as its effect upon the mental, moral, and physical health of the average person. Brother DOUGLAS' view as to the lack of proof in this area is not so firmly held among behavioral scientists as he would lead us to believe. For this reason, I should mention that there is a division of thought on the correlation between obscenity and socially deleterious behavior.

Psychological and physiological studies clearly indicate that many persons become sexually aroused from reading

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obscene material. [Footnote 3/4] While erotic stimulation caused by pornography may be legally insignificant in itself, there are medical experts who believe that such stimulation frequently manifests itself in criminal sexual behavior or other antisocial conduct. [Footnote 3/5] For example, Dr. George W. Henry of Cornell University has expressed the opinion that obscenity, with its exaggerated and morbid emphasis on sex, particularly abnormal and perverted practices, and its unrealistic presentation of sexual behavior and attitudes, may induce antisocial conduct by the average person. [Footnote 3/6] A number of sociologists think that this material may have adverse effects upon individual mental health, with potentially disruptive consequences for the community. [Footnote 3/7]

In addition, there is persuasive evidence from criminologists and police officials. Inspector Herbert Case of the Detroit Police Department contends that sex murder cases are invariably tied to some form of obscene literature. [Footnote 3/8] And the Director of the Federal Bureau of Investigation, J. Edgar Hoover, has repeatedly emphasized that

pornography is associated with an overwhelmingly large number of sex crimes. Again, while the correlation between possession of obscenity and deviant behavior

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has not been conclusively established, the files of our law enforcement agencies contain many reports of persons who patterned their criminal conduct after behavior depicted in obscene material. [Footnote 3/9]

The clergy are also outspoken in their belief that pornography encourages violence, degeneracy and sexual misconduct. In a speech reported by the New York Journal-American August 7, 1964, Cardinal Spellman particularly stressed the direct influence obscenity has on immature persons. These and related views have been confirmed by practical experience. After years of service with the West London Mission, Rev. Donald Soper found that pornography was a primary cause of prostitution. Rolph, Does Pornography Matter? (1961), pp. 478. [Footnote 3/10]

Congress and the legislatures of every State have enacted measures to restrict the distribution of erotic and pornographic material, [Footnote 3/11] justifying these controls by reference to evidence that antisocial behavior may result in part from reading obscenity. [Footnote 3/12] Likewise, upon another trial, the parties may offer this sort of evidence along with other "social value" characteristics that they attribute to the book.

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But this is not all that Massachusetts courts might consider. I believe it can be established that the book "was commercially exploited for the sake of prurient appeal, to the exclusion of all other values" and should therefore be declared obscene under the test of commercial exploitation announced today in *Ginzburg* and *Mishkin*.

As I have stated, my study of *Memoirs* leads me to think that it has no conceivable "social importance." The author's obsession with sex, his minute descriptions of phalli, and his repetitious accounts of bawdy sexual experiences and deviant sexual behavior indicate the book was designed solely to appeal to prurient interests. In addition, the record before the Court contains extrinsic evidence tending to show that the publisher was fully aware that the book attracted readers desirous of vicarious sexual pleasure, and sought to profit solely from its prurient appeal. The publisher's "Introduction" recites that Cleland, a "never-dowell bohemian," wrote the book in 1749 to make a quick 20 guineas. Thereafter, various publications of the book, often "embellished with fresh inflammatory details" and "highly exaggerated illustrations," appeared in "surreptitious circulation." Indeed, the cover of

Memoirs tempts the reader with the announcement that the sale of the book has finally been permitted "after 214 years of suppression." Although written in a sophisticated tone, the "Introduction" repeatedly informs the reader that he may expect graphic descriptions of genitals and sexual exploits. For instance, it states:

"Here and there, Cleland's descriptions of lovemaking are marred by what perhaps could be best described as his adherence to the 'longitudinal fallacy' -- the formidable bodily equipment of his most

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accomplished lovers is apt to be described with quite unnecessary relish. . . ."

Many other passages in the "Introduction" similarly reflect the publisher's "own evaluation" of the book's nature. The excerpt printed on the jacket of the hardcover edition is typical:

"*Memoirs of a Woman of Pleasure* is the product of a luxurious and licentious, but not a commercially degraded, era. . . . For all its abounding improprieties, his priapic novel is not a vulgar book. It treats of pleasure as the aim and end of existence, and of sexual satisfaction as the epitome of pleasure, but does so in a style that, despite its inflammatory subject, never stoops to a gross or unbecoming word."

Cleland apparently wrote only one other book, a sequel called *Memoirs of a Coxcomb*, published by Lancer Books, Inc. The "Introduction" to that book labels *Memoirs of a Woman of Pleasure* as "the most sensational piece of erotica in English literature." I daresay that this fact alone explains why G. P. Putnam's Sons published this obscenity -- preying upon prurient and carnal proclivities for its own pecuniary advantage. I would affirm the judgment.

[Footnote 3/1]

See Lochart & McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 Minn.L.Rev. 5, 53-55 (1960).

[Footnote 3/2]

In a preface to the paperback edition, "A Note on the American History of *Memoirs of a Woman of Pleasure*," the publisher itself mentions several critics who denied the book had any literary merit and found it totally undistinguished. These critics included Ralph Thompson and Clifton Fadiman. P. xviii.

[Footnote 3/3]

As one review stated:

"Yet all these pangs of defloration are in the service of erotic pleasure -- Fanny's and the reader's. Postponing the culmination of Fanny's deflowering is equivalent to postponing the point where the reader has a mental orgasm."

[Footnote 3/4]

For a summary of experiments with various sexual stimuli, *see* Cairns, Paul & Wishner, Sex Censorship: The Assumptions of Anti-Obscenity Laws and the the Empirical Evidence, 46 Minn.L.Rev. 1009 (1962). The authors cite research by Kinsey disclosing that obscene literature stimulated a definite sexual response in a majority of the male and female subjects tested.

[Footnote 3/5]

E.g., Wertham, Seduction of the Innocent (1954), p. 164.

[Footnote 3/6]

Testimony before the Subcommittee of the Judiciary Committee to Investigate Juvenile Delinquency, S.Rep. No. 2381, 84th Cong., 2d Sess., pp. 8-12 (1956).

[Footnote 3/7]

Sorokin, The American Sex Revolution (1956).

[Footnote 3/8]

Testimony before the House Select Committee on Current Pornographic Materials, H.R.Rep. No. 2510, 82d Cong., & Sess., p. 62 (1952).

[Footnote 3/9]

See, e.g., Hoover, Combating Merchants of Filth: The Role of the FBI, 25 U.Pitt.L.Rev. 469 (1964); Hoover, The Fight Against Filth, The American Legion Magazine (May 1961).

[Footnote 3/10]

For a general discussion *see* Murphy, Censorship: Government and Obscenity (1963), pp. 131-151.

[Footnote 3/11]

The statutes are compiled in S.Rep. No. 2381, 84th Cong., 2d Sess., pp. 17-'3 (1956). While New Mexico itself does not prohibit the distribution of obscenity, it has a statute giving municipalities the right to suppress "obscene" publications. N.M.Stat. § 14-17-14 (1965 Supp.).

[Footnote 3/12]

See Report of the New York State Joint Legislative Committee Studying the Publication and Dissemination of Offensive and Obscene Material (1958), pp. 141-166.

MR. JUSTICE HARLAN, dissenting.

The central development that emerges from the aftermath of *Roth v. United States*, 354 U. S. 476, is that no stable approach to the obscenity problem has yet been devised by this Court. Two Justices believe that the First and Fourteenth Amendments absolutely protect obscene and nonobscene material alike. Another Justice believes that neither the States nor the Federal Government may suppress any material save for "hard-core pornography." *Roth*, in 1957, stressed prurience and

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utter lack of redeeming social importance; [Footnote 4/1] as *Roth* has been expounded in this case, in *Ginzburg v. United States*, *post*, p. 383 U. S. 463, and in *Mishkin v. New York*, *post*, p. 383 U. S. 502, it has undergone significant transformation. The concept of "pandering," emphasized by the separate opinion of THE CHIEF JUSTICE in *Roth*, now emerges as an uncertain gloss or interpretive aid, and the further requisite of "patent offensiveness" has been made explicit as a result of intervening decisions. Given this tangled state of affairs, I feel free to adhere to the principles first set forth in my separate opinion in *Roth*, 354 U.S. at 354 U. S. 496, which I continue to believe represent the soundest constitutional solution to this intractable problem.

My premise is that, in the area of obscenity, the Constitution does not bind the States and the Federal Government in precisely the same fashion. This approach is plainly consistent with the language of the First and Fourteenth Amendments and, in my opinion, more responsive to the proper functioning of a federal system of government in this area. See my opinion in *Roth*, 354 U.S. at 354 U. S. 505-506. I believe it is also consistent with past decisions of this Court. Although some 40 years have passed since the Court first indicated that the Fourteenth Amendment protects "free speech," see *Gitlow v. New York*, 268 U. S.

652; *Fiske v. Kansas*, 274 U. S. 380, the decisions have never declared that every utterance the Federal Government may not reach or every regulatory scheme it may not enact is also beyond the power of the State. The very criteria used in opinions to delimit the protection of free speech -- the gravity of the evil being regulated, see *Schneider v. State*, 308 U. S. 147; how "clear and present" is the danger, *Schenck v.*

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United States, 249 U. S. 47, 249 U. S. 52 (Holmes, J.); the magnitude of "such invasion of free speech as is necessary to avoid the danger," *United States v. Dennis*, 183 F.2d 201, 212 (L. Hand, J.) -- may and do depend on the particular context in which power is exercised. When, for example, the Court in *Beauharnais v. Illinois*, 343 U. S. 250, upheld a criminal group libel law because of the "social interest in order and morality," 343 U.S. at 343 U. S. 257, it was acknowledging the responsibility and capacity of the States in such public welfare matters and not committing itself to uphold any similar federal statute applying to such communications as Congress might otherwise regulate under the commerce power. See also *Kovacs v. Cooper*, 336 U. S. 77.

Federal suppression of allegedly obscene matter should, in my view, be constitutionally limited to that often described as "hard-core pornography." To be sure, that rubric is not a self-executing standard, but it does describe something that most judges and others will "know . . . when [they] see it" (STEWART, J., in *Jacobellis v. Ohio*, 378 U. S. 184, 378 U. S. 197) and that leaves the smallest room for disagreement between those of varying tastes. To me it is plain, for instance, that Fanny Hill does not fall within this class and could not be barred from the federal mails. If further articulation is meaningful, I would characterize as "hard-core" that prurient material that is patently offensive or whose indecency is self-demonstrating and I would describe it substantially as does MR. JUSTICE STEWART's opinion in *Ginzburg*, post, p. 383 U. S. 499. The Federal Government may be conceded a limited interest in excluding from the mails such gross pornography, almost universally condemned in this country. [Footnote 4/2] But I believe the dangers of national

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ensorship and the existence of primary responsibility at the state level amply justify drawing the line at this point.

State obscenity laws present problems of quite a different order. The varying conditions across the country, the range of views on the need and reasons for curbing obscenity, and the traditions of local self-government in matters of public welfare all favor a far more flexible attitude in defining the bounds for the States. From my standpoint, the Fourteenth

Amendment requires of a State only that it apply criteria rationally related to the accepted notion of obscenity and that it reach results not wholly out of step with current American standards. As to criteria, it should be adequate if the court or jury considers such elements as offensiveness, pruriency, social value, and the like. The latitude which I believe the States deserve cautions against any federally imposed formula listing the exclusive ingredients of obscenity and fixing their proportions. This approach concededly lacks precision, but imprecision is characteristic of mediating constitutional standards; [Footnote 4/3] voluntariness of a confession, clear and present danger, and probable cause are only the most ready illustrations. In time, and with more litigated examples, predictability increases, but there is no shortcut to satisfactory solutions in this field, and there is no advantage in supposing otherwise.

I believe the tests set out in the prevailing opinion, judged by their application in this case, offer only an

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illusion of certainty and risk confusion and prejudice. The opinion declares that a book cannot be banned unless it is "utterly without redeeming social value" (*ante*, p. 383 U. S. 418). To establish social value in the present case, a number of acknowledged experts in the field of literature testified that *Fanny Hill* held a respectable place in serious writing, and unless such largely uncontradicted testimony is accepted as decisive, it is very hard to see that the "utterly without redeeming social value" test has any meaning at all. Yet the prevailing opinion, while denying that social value may be "weighed against" or "canceled by" prurience or offensiveness (*ante*, p. 383 U. S. 419), terminates this case unwilling to give a conclusive decision on the status of *Fanny Hill* under the Constitution. [Footnote 4/4] Apparently, the Court believes that the social value of the book may be negated if proof of pandering is present. Using this inherently vague "pandering" notion to offset "social value" wipes out any certainty the latter term might be given by reliance on experts, and admits into the case highly prejudicial evidence without appropriate restrictions. *See* my dissenting opinion in *Ginzburg*, *post*, p. 383 U. S. 493. I think it more satisfactory to acknowledge that, on this record the book has been shown to have some quantum of social value, that it may at the same time be deemed offensive and salacious, and that the State's decision to weigh these elements and to ban this particular work does not exceed constitutional limits.

A final aspect of the obscenity problem is the role this Court is to play in administering its standards, a matter

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that engendered justified concern at the oral argument of the cases now decided. Short of saying that no material relating to sex may be banned, or that all of it may be, I do not see how this Court can escape the task of reviewing obscenity decisions on a case-by-case basis. The views of literary or other experts could be made controlling, but those experts had their say in *Fanny Hill*, and apparently the majority is no more willing than I to say that Massachusetts must abide by their verdict. Yet I venture to say that the Court's burden of decision would be ameliorated under the constitutional principles that I have advocated. "Hard-core pornography" for judging federal cases is one of the more tangible concepts in the field. As to the States, the due latitude my approach would leave them ensures that only the unusual case would require plenary review and correction by this Court.

There is plenty of room, I know, for disagreement in this area of constitutional law. Some will think that what I propose may encourage States to go too far in this field. Others will consider that the Court's present course unduly restricts state experimentation with the still elusive problem of obscenity. For myself, I believe it is the part of wisdom for those of us who happen currently to possess the "final word" to leave room for such experimentation, which indeed is the underlying genius of our federal system.

On the premises set forth in this opinion, supplementing what I have earlier said in my opinions in *Roth, supra*, *Manual Enterprises, Inc. v. Day*, 370 U. S. 478. and *Jacobellis v. Ohio*, 378 U.S. at 378 U. S. 203, I would affirm the judgment of the Massachusetts Supreme Judicial Court.

[Footnote 4/1]

Given my view of the applicable constitutional standards, I find no occasion to consider the place of "redeeming social importance" in the majority opinion in *Roth*, an issue which further divides the present Court.

[Footnote 4/2]

This interest may be viewed from different angles. Compelling the Post Office to aid actively in disseminating this most obnoxious material may simply appear too offensive in itself. Or, more concretely, use of the mails may facilitate or insulate distribution so greatly that federal inaction amounts to thwarting state regulation.

[Footnote 4/3]

The deterrent effect of vagueness for that critical class of books near the law's borderline could in the past be ameliorated by devices like the Massachusetts *in rem* procedure used

in this case. Of course, the Court's newly adopted "panderer" test, turning as it does on the motives and actions of the particular defendant, seriously undercuts the effort to give any seller a yes or no answer on a book in advance of his own criminal prosecution.

[Footnote 4/4]

As I understand the prevailing opinion, its rationale is that the state court may not condemn *Fanny Hill* as obscene after finding the book to have a modicum of social value; the opinion does note that proof of pandering "might justify the conclusion" that the book wholly lacks social value (*ante*, p. 383 U. S. 420). Given its premise for reversal, the opinion has "no occasion to assess" for itself the pruriency, offensiveness, or lack of social value of the book (*ante* p. 383 U. S. 420).

MR. JUSTICE WHITE, dissenting.

In *Roth v. United States*, 354 U. S. 476, the Court held a publication to be obscene if its predominant theme

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appeals to the prurient interest in a manner exceeding customary limits of candor. Material of this kind, the Court said, is "utterly without redeeming social importance," and is therefore unprotected by the First Amendment.

To say that material within the *Roth* definition of obscenity is nevertheless not obscene if it has some redeeming social value is to reject one of the basic propositions of the *Roth* case -- that such material is not protected because it is inherently and utterly without social value.

If "social importance" is to be used as the prevailing opinion uses it today, obscene material, however far beyond customary limits of candor, is immune if it has any literary style, if it contains any historical references or language characteristic of a bygone day, or even if it is printed or bound in an interesting way. Well written, especially effective obscenity is protected; the poorly written is vulnerable. And why shouldn't the fact that some people buy and read such material prove its "social value"?

A fortiori, if the predominant theme of the book appeals to the prurient interest, as stated in *Roth*, but the book nevertheless contains here and there a passage descriptive of character, geography or architecture, the book would not be "obscene" under the social importance test. I had thought that *Roth* counseled the contrary: that the character of the book is fixed by its predominant theme, and is not altered by the presence of minor themes of a different nature. The *Roth* Court's emphatic reliance on the quotation from *Chenier*

of a different nature. The *Roth* Court's emphatic reliance on the quotation from *Chaplinsky v. New Hampshire*, 315 U. S. 568, means nothing less:

" . . . There are certain well defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include

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the lewd and obscene. . . . It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. . . .' (Emphasis added.)"

354 U.S. at 354 U. S. 485.

In my view, "social importance" is not an independent test of obscenity, but is relevant only to determining the predominant prurient interest of the material, a determination which the court or the jury will make based on the material itself and all the evidence in the case, expert or otherwise.

Application of the *Roth* test, as I understand it, necessarily involves the exercise of judgment by legislatures, courts and juries. But this does not mean that there are no limits to what may be done in the name of *Roth*. Cf. *Jacobellis v. Ohio*, 378 U. S. 184. *Roth* does not mean that a legislature is free to ban books simply because they deal with sex or because they appeal to the prurient interest. Nor does it mean that, if books like *Fanny Hill* are unprotected, their nonprurient appeal is necessarily lost to the world. Literary style, history, teachings about sex, character description (even of a prostitute) or moral lessons need not come wrapped in such packages. The fact that they do impeaches their claims to immunity from legislative censure.

Finally, it should be remembered that, if the publication and sale of *Fanny Hill* and like books are proscribed, it is not the Constitution that imposes the ban. Censure stems from a legislative act, and legislatures are constitutionally free to embrace such books whenever they wish to do so. But if a State insists on treating *Fanny Hill* as obscene and forbidding its sale, the First Amendment does not prevent it from doing so.

I would affirm the judgment below.

Materials

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Miller v California

413 US 15

1973

Miller v. California, 413 U.S. 15 (1973)

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Argued:

January 18, 1972

Argued:

January 19, 1972

Reargued:

November 7, 1972

Decided:

June 21, 1973

Annotation

PRIMARY HOLDING

Speech that is obscene and thus lacking First Amendment protection must be without serious literary, artistic, political, or scientific value. It also must appeal to the prurient interest in the view of an average person according to community standards, and it must describe sexual conduct or excretory functions in an offensive way.

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Syllabus

U.S. Supreme Court

Miller v. California, 413 U.S. 15 (1973)

Miller v. California

No. 70-73

Argued January 18-19, 1972

Reargued November 7, 1972

Decided June 21, 1973

413 U.S. 15

Syllabus

Appellant was convicted of mailing unsolicited sexually explicit material in violation of a California statute that approximately incorporated the obscenity test formulated in *Memoirs v. Massachusetts*, 383 U. S. 413, 383 U. S. 418 (plurality opinion). The trial court instructed the jury to evaluate the materials by the contemporary community standards of California. Appellant's conviction was affirmed on appeal. In lieu of the obscenity criteria enunciated by the *Memoirs* plurality, it is *held*:

1. Obscene material is not protected by the First Amendment. *Roth v. United States*, 354 U. S. 476, reaffirmed. A work may be subject to state regulation where that work, taken as a whole, appeals to the prurient interest in sex; portrays, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and, taken as a whole, does not have serious literary, artistic, political, or scientific value. Pp. 413 U. S. 23-24.
2. The basic guidelines for the trier of fact must be: (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest, *Roth, supra*, at 354 U. S. 489, (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. If a state obscenity law is thus limited, First Amendment values are adequately protected by ultimate independent appellate review of constitutional claims when necessary. Pp. 413 U. S. 24-25.
3. The test of "utterly without redeeming social value" articulated in *Memoirs, supra*, is rejected as a constitutional standard. Pp. 413 U. S. 24-25.
4. The jury may measure the essentially factual issues of prurient appeal and patent offensiveness by the standard that prevails in the forum community, and need not employ a "national standard." Pp. 413 U. S. 30-34.

Vacated and remanded.

Page 413 U. S. 16

BURGER, C.J., delivered the opinion of the Court, in which WHITE, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. DOUGLAS, J., filed a dissenting opinion, *post*, p. 413 U. S. 37. BRENNAN, J., filed a dissenting opinion, in which STEWART and MARSHALL, JJ., joined, *post*, p. 413 U. S. 47.

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Opinions

Opinions & Dissents

U.S. Supreme Court

Miller v. California, 413 U.S. 15 (1973)

Miller v. California

No. 70-73

Argued January 18-19, 1972

Reargued November 7, 1972

Decided June 21, 1973

413 U.S. 15

APPEAL FROM THE APPELLATE DEPARTMENT, SUPERIOR COURT

OF CALIFORNIA, COUNTY OF ORANGE

Syllabus

Appellant was convicted of mailing unsolicited sexually explicit material in violation of a California statute that approximately incorporated the obscenity test formulated in *Memoirs v. Massachusetts*, 383 U. S. 413, 383 U. S. 418 (plurality opinion). The trial court instructed the jury to evaluate the materials by the contemporary community standards of California. Appellant's conviction was affirmed on appeal. In lieu of the obscenity criteria enunciated by the *Memoirs* plurality, it is *held*:

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2. The basic guidelines for the trier of fact must be: (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest, *Roth, supra*, at 354 U. S. 489, (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. If a state obscenity law is thus limited, First

Amendment values are adequately protected by ultimate independent appellate review of constitutional claims when necessary. Pp. 413 U. S. 24-25.

3. The test of "utterly without redeeming social value" articulated in *Memoirs, supra*, is rejected as a constitutional standard. Pp. 413 U. S. 24-25.

4. The jury may measure the essentially factual issues of prurient appeal and patent offensiveness by the standard that prevails in the forum community, and need not employ a "national standard." Pp. 413 U. S. 30-34.

Vacated and remanded.

Page 413 U. S. 16

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MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

This is one of a group of "obscenity-pornography" cases being reviewed by the Court in a reexamination of standards enunciated in earlier cases involving what Mr. Justice Harlan called "the intractable obscenity problem." *Interstate Circuit, Inc. v. Dallas*, 390 U. S. 676, 390 U. S. 704 (1968) (concurring and dissenting).

Appellant conducted a mass mailing campaign to advertise the sale of illustrated books, euphemistically called "adult" material. After a jury trial, he was convicted of violating California Penal Code § 311.2(a), a misdemeanor, by knowingly distributing obscene matter, [Footnote 1]

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and the Appellate Department, Superior Court of California, County of Orange, summarily affirmed the judgment without opinion. Appellant's conviction was specifically

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based on his conduct in causing five unsolicited advertising brochures to be sent through the mail in an envelope addressed to a restaurant in Newport Beach, California. The envelope was opened by the manager of the restaurant and his mother. They had not requested the brochures; they complained to the police.

brochures, they complained to the police.

The brochures advertise four books entitled "Intercourse," "Man-Woman," "Sex Orgies Illustrated," and "An Illustrated History of Pornography," and a film entitled "Marital Intercourse." While the brochures contain some descriptive printed material, primarily they consist of pictures and drawings very explicitly depicting men and women in groups of two or more engaging in a variety of sexual activities, with genitals often prominently displayed.

I

This case involves the application of a State's criminal obscenity statute to a situation in which sexually explicit materials have been thrust by aggressive sales action upon unwilling recipients who had in no way indicated any desire to receive such materials. This Court has recognized that the States have a legitimate interest in prohibiting dissemination or exhibition of obscene material [Footnote 2]

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when the mode of dissemination carries with it a significant danger of offending the sensibilities of unwilling recipients or of exposure to juveniles. *Stanley v. Georgia*, 394 U. S. 557, 394 U. S. 567 (1969); *Ginsberg v. New York*, 390 U. S. 629, 390 U. S. 637-643 (1968); *Interstate Circuit, Inc. v. Dallas*, *supra*, at 390 U. S. 690; *Redrup v. New York*, 386 U. S. 767, 386 U. S. 769 (1967); *Jacobellis v. Ohio*, 378 U. S. 184, 378 U. S. 195 (1964). *See Rabe v. Washington*, 405 U. S. 313, 405 U. S. 317 (1972) (BURGER, C.J., concurring); *United States v. Reidel*, 402 U. S. 351, 402 U. S. 360-362 (1971) (opinion of MARSHALL, J.); *Joseph Burstyn, Inc. v. Wilson*, 343 U. S. 495, 343 U. S. 502 (1952); *Breard v. Alexandria*, 341 U. S. 622, 341 U. S. 644-645 (1951); *Kovacs v. Cooper*, 336 U. S. 77, 336 U. S. 88-89 (1949); *Prince v. Massachusetts*, 321 U. S. 158, 321 U. S. 169-170 (1944). *Cf. Butler v. Michigan*, 352 U. S. 380, 352 U. S. 382-383 (1957); *Public Utilities Comm'n v. Pollak*, 343 U. S. 451, 343 U. S. 464-465 (1952) It is in this context that we are called

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on to define the standards which must be used to identify obscene material that a State may regulate without infringing on the First Amendment as applicable to the States through the Fourteenth Amendment.

The dissent of MR. JUSTICE BRENNAN reviews the background of the obscenity problem, but since the Court now undertakes to formulate standards more concrete than those in the past, it is useful for us to focus on two of the landmark cases in the somewhat tortured

history of the Court's obscenity decisions. In *Roth v. United States*, 354 U. S. 476 (1957), the Court sustained a conviction under a federal statute punishing the mailing of "obscene, lewd, lascivious or filthy . . ." materials. The key to that holding was the Court's rejection of the claim that obscene materials were protected by the First Amendment. Five Justices joined in the opinion stating:

"All ideas having even the slightest redeeming social importance -- unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion -- have the full protection of the [First Amendment] guaranties, unless excludable because they encroach upon the limited area of more important interests. But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance. . . . This is the same judgment expressed by this Court in *Chaplinsky v. New Hampshire*, 315 U. S. 568, 315 U. S. 571-572: "

". . . There are certain well defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. *These include the lewd and obscene. . . . It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social*

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value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. . . ."

[Emphasis by Court in *Roth* opinion.]

"We hold that obscenity is not within the area of constitutionally protected speech or press."

354 U.S. at 354 U. S. 48 85 (footnotes omitted).

Nine years later, in *Memoirs v. Massachusetts*, 383 U. S. 413 (1966), the Court veered sharply away from the *Roth* concept and, with only three Justices in the plurality opinion, articulated a new test of obscenity. The plurality held that, under the *Roth* definition,

"as elaborated in subsequent cases, three elements must coalesce: it must be established that (a) the dominant theme of the material, taken as a whole, appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value."

Id. at 383 U. S. 418. The sharpness of the break with *Roth*, represented by the third

element of the *Memoirs* test and emphasized by MR. JUSTICE WHITE's dissent, *id.* at 383 U. S. 460-462, was further underscored when the *Memoirs* plurality went on to state:

"The Supreme Judicial Court erred in holding that a book need not be 'unqualifiedly worthless before it can be deemed obscene.' A book cannot be proscribed unless it is found to be *utterly* without redeeming social value."

Id. at 383 U. S. 419 (emphasis in original).

While *Roth* presumed "obscenity" to be "utterly without redeeming social importance," *Memoirs* required

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that to prove obscenity it must be affirmatively established that the material is "*utterly* without redeeming social value." Thus, even as they repeated the words of *Roth*, the *Memoirs* plurality produced a drastically altered test that called on the prosecution to prove a negative, *i.e.*, that the material was "*utterly* without redeeming social value" -- a burden virtually impossible to discharge under our criminal standards of proof. Such considerations caused Mr. Justice Harlan to wonder if the "*utterly* without redeeming social value" test had any meaning at all. *See Memoirs v. Massachusetts*, *id.* at 383 U. S. 459 (Harlan, J., dissenting). *See also id.* at 383 U. S. 461 (WHITE, J., dissenting); *United States v. Groner*, 479 F.2d 577, 579-581 (CA5 1973).

Apart from the initial formulation in the *Roth* case, no majority of the Court has at any given time been able to agree on a standard to determine what constitutes obscene, pornographic material subject to regulation under the States' police power. *See, e.g., Redrup v. New York*, 386 U.S. at 386 U. S. 770-771. We have seen "a variety of views among the members of the Court unmatched in any other course of constitutional adjudication." *Interstate Circuit, Inc. v. Dallas*, 390 U.S. at 390 U. S. 704-705 (Harlan, J., concurring and dissenting) (footnote omitted). [Footnote 3] This is not remarkable, for in the area

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of freedom of speech and press the courts must always remain sensitive to any infringement on genuinely serious literary, artistic, political, or scientific expression. This is an area in which there are few eternal verities.

The case we now review was tried on the theory that the California Penal Code § 311 approximately incorporates the three-stage *Memoirs* test, *supra*. But now the *Memoirs*

test has been abandoned as unworkable by its author, [Footnote 4] and no Member of the Court today supports the *Memoirs* formulation.

II

This much has been categorically settled by the Court, that obscene material is unprotected by the First Amendment. *Kois v. Wisconsin*, 408 U. S. 229 (1972); *United States v. Reidel*, 402 U.S. at 402 U. S. 354; *Roth v. United States*, *supra*, at 354 U. S. 485. [Footnote 5] "The First and Fourteenth Amendments have never been treated as absolutes [footnote omitted]." *Breard v. Alexandria*, 341 U.S. at 341 U. S. 642, and cases cited. *See Times Film Corp. v. Chicago*, 365 U. S. 43, 365 U. S. 47-50 (1961); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. at 343 U. S. 502. We acknowledge, however, the inherent dangers of undertaking to regulate any form of expression. State statutes designed to regulate obscene materials must be

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carefully limited. *See Interstate Circuit, Inc. v. Dallas*, *supra*, at 390 U. S. 682-685. As a result, we now confine the permissible scope of such regulation to works which depict or describe sexual conduct. That conduct must be specifically defined by the applicable state law, as written or authoritatively construed. [Footnote 6] A state offense must also be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value.

The basic guidelines for the trier of fact must be: (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest, *Kois v. Wisconsin*, *supra*, at 408 U. S. 230, quoting *Roth v. United States*, *supra*, at 354 U. S. 489; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. We do not adopt as a constitutional standard the "utterly without redeeming social value" test of *Memoirs v. Massachusetts*,

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383 U.S. at 383 U. S. 419; that concept has never commanded the adherence of more than three Justices at one time. [Footnote 7] *See supra* at 413 U. S. 21. If a state law that regulates obscene material is thus limited, as written or construed, the First Amendment values applicable to the States through the Fourteenth Amendment are adequately protected by the ultimate power of appellate courts to conduct an independent review of

protected by the ultimate power of appellate courts to conduct an independent review of constitutional claims when necessary. *See Kois v. Wisconsin, supra*, at 408 U. S. 232; *Memoirs v. Massachusetts, supra*, at 383 U. S. 459-460 (Harlan, J., dissenting); *Jacobellis v. Ohio*, 378 U.S. at 204 (Harlan, J., dissenting); *New York Times Co. v. Sullivan*, 376 U. S. 254, 376 U. S. 284-285 (1964); *Roth v. United States, supra*, at 354 U. S. 497-498 (Harlan, J., concurring and dissenting).

We emphasize that it is not our function to propose regulatory schemes for the States. That must await their concrete legislative efforts. It is possible, however, to give a few plain examples of what a state statute could define for regulation under part (b) of the standard announced in this opinion, *supra*:

(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.

(b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals.

Sex and nudity may not be exploited without limit by films or pictures exhibited or sold in places of public accommodation any more than live sex and nudity can

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be exhibited or sold without limit in such public places. [Footnote 8] At a minimum, prurient, patently offensive depiction or description of sexual conduct must have serious literary, artistic, political, or scientific value to merit First Amendment protection. *See Kois v. Wisconsin, supra*, at 408 U. S. 230-232; *Roth v. United States, supra*, at 354 U. S. 487; *Thornhill v. Alabama*, 310 U. S. 88, 310 U. S. 101-102 (1940). For example, medical books for the education of physicians and related personnel necessarily use graphic illustrations and descriptions of human anatomy. In resolving the inevitably sensitive questions of fact and law, we must continue to rely on the jury system, accompanied by the safeguards that judges, rules of evidence, presumption of innocence, and other protective features provide, as we do with rape, murder, and a host of other offenses against society and its individual members. [Footnote 9]

MR. JUSTICE BRENNAN, author of the opinions of the Court, or the plurality opinions, in *Roth v. United States, supra*; *Jacobellis v. Ohio, supra*; *Ginzburg v. United*

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States, 383 U. S. 463 (1966), *Mishkin v. New York*, 383 U. S. 502 (1966); and *Memoirs v.*

Massachusetts, supra, has abandoned his former position and now maintains that no formulation of this Court, the Congress, or the States can adequately distinguish obscene material unprotected by the First Amendment from protected expression, *Paris Adult Theatre I v. Slaton*, *post*, p. 413 U. S. 73 (BRENNAN, J., dissenting). Paradoxically, MR. JUSTICE BRENNAN indicates that suppression of unprotected obscene material is permissible to avoid exposure to unconsenting adults, as in this case, and to juveniles, although he gives no indication of how the division between protected and nonprotected materials may be drawn with greater precision for these purposes than for regulation of commercial exposure to consenting adults only. Nor does he indicate where in the Constitution he finds the authority to distinguish between a willing "adult" one month past the state law age of majority and a willing "juvenile" one month younger.

Under the holdings announced today, no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive "hard core" sexual conduct specifically defined by the regulating state law, as written or construed. We are satisfied that these specific prerequisites will provide fair notice to a dealer in such materials that his public and commercial activities may bring prosecution. *See Roth v. United States, supra*, at 354 U. S. 491-492. *Cf. Ginsberg v. New York*, 390 U.S. at 390 U. S. 643. [Footnote 10] If

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the inability to define regulated materials with ultimate, god-like precision altogether removes the power of the States or the Congress to regulate, then "hard core" pornography may be exposed without limit to the juvenile, the passerby, and the consenting adult alike, as, indeed, MR. JUSTICE DOUGLAS contends. As to MR. JUSTICE DOUGLAS' position, *see United States v. Thirty-seven Photographs*, 402 U. S. 363, 402 U. S. 379-380 (1971) (Black, J., joined by DOUGLAS, J., dissenting); *Ginzburg v. United States, supra*, at 383 U. S. 476, 383 U. S. 491-492 (Black, J., and DOUGLAS, J., dissenting); *Jacobellis v. Ohio, supra*, at 378 U. S. 196 (Black, J., joined by DOUGLAS, J., concurring); *Roth, supra*, at 354 U. S. 508-514 (DOUGLAS, J., dissenting). In this belief, however, MR. JUSTICE DOUGLAS now stands alone.

MR. JUSTICE BRENNAN also emphasizes "institutional stress" in justification of his change of view. Noting that "[t]he number of obscenity cases on our docket gives ample testimony to the burden that has been placed upon this Court," he quite rightly remarks that the examination of contested materials "is hardly a source of edification to the members of this Court." *Paris Adult*

Theatre I v. Slaton, post, at 413 U. S. 92, 413 U. S. 93. He also notes, and we agree, that "uncertainty of the standards creates a continuing source of tension between state and federal courts. . . ."

"The problem is . . . that one cannot say with certainty that material is obscene until at least five members of this Court, applying inevitably obscure standards, have pronounced it so."

Id. at 413 U. S. 93, 413 U. S. 92.

It is certainly true that the absence, since *Roth*, of a single majority view of this Court as to proper standards for testing obscenity has placed a strain on both state and federal courts. But today, for the first time since *Roth* was decided in 1957, a majority of this Court has agreed on concrete guidelines to isolate "hard core" pornography from expression protected by the First Amendment. Now we may abandon the casual practice of *Redrup v. New York*, 386 U. S. 767 (1967), and attempt to provide positive guidance to federal and state courts alike.

This may not be an easy road, free from difficulty. But no amount of "fatigue" should lead us to adopt a convenient "institutional" rationale -- an absolutist, "anything goes" view of the First Amendment -- because it will lighten our burdens. [Footnote 11] "Such an abnegation of judicial supervision in this field would be inconsistent with our duty to uphold the constitutional guarantees." *Jacobellis v. Ohio, supra*, at 378 U. S. 187-188 (opinion of BRENNAN, J.). Nor should we remedy "tension between state and federal courts" by arbitrarily depriving the States of a power reserved to them under the Constitution, a power which they have enjoyed and exercised continuously from before the adoption of the First Amendment to this day. *See Roth v. United States, supra*, at 354 U. S. 482-485.

"Our duty admits of no 'substitute for facing up

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to the tough individual problems of constitutional judgment involved in every obscenity case.' [*Roth v. United States, supra*, at 354 U. S. 498]; *see Manual Enterprises, Inc. v. Day*, 370 U. S. 478, 370 U. S. 488 (opinion of Harlan, J.) [footnote omitted]."

Jacobellis v. Ohio, supra, at 378 U. S. 188 (opinion of BRENNAN, J.).

III

Under a National Constitution, fundamental First Amendment limitations on the powers of

the States do not vary from community to community, but this does not mean that there are, or should or can be, fixed, uniform national standards of precisely what appeals to the "prurient interest" or is "patently offensive." These are essentially questions of fact, and our Nation is simply too big and too diverse for this Court to reasonably expect that such standards could be articulated for all 50 States in a single formulation, even assuming the prerequisite consensus exists. When triers of fact are asked to decide whether "the average person, applying contemporary community standards" would consider certain materials "prurient," it would be unrealistic to require that the answer be based on some abstract formulation. The adversary system, with lay jurors as the usual ultimate factfinders in criminal prosecutions, has historically permitted triers of fact to draw on the standards of their community, guided always by limiting instructions on the law. To require a State to structure obscenity proceedings around evidence of a *national* "community standard" would be an exercise in futility.

As noted before, this case was tried on the theory that the California obscenity statute sought to incorporate the tripartite test of *Memoirs*. This, a "national" standard of First Amendment protection enumerated by a plurality of this Court, was correctly regarded at the time of trial as limiting state prosecution under the controlling case

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law. The jury, however, was explicitly instructed that, in determining whether the "dominant theme of the material as a whole . . . appeals to the prurient interest," and, in determining whether the material "goes substantially beyond customary limits of candor and affronts contemporary community standards of decency," it was to apply "contemporary community standards of the State of California."

During the trial, both the prosecution and the defense assumed that the relevant "community standards" in making the factual determination of obscenity were those of the State of California, not some hypothetical standard of the entire United States of America. Defense counsel at trial never objected to the testimony of the State's expert on community standards [Footnote 12] or to the instructions of the trial judge on "state-wide" standards. On appeal to the Appellate Department, Superior Court of California, County of Orange, appellant for the first time contended that application of state, rather than national, standards violated the First and Fourteenth Amendments.

We conclude that neither the State's alleged failure to offer evidence of "national standards," nor the trial court's charge that the jury consider state community standards, were constitutional errors. Nothing in the First Amendment requires that a jury must consider hypothetical and unascertainable "national standards" when attempting to

determine whether certain materials are obscene as a matter

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of fact. Mr. Chief Justice Warren pointedly commented in his dissent in *Jacobellis v. Ohio*, *supra*, at 378 U. S. 200:

"It is my belief that, when the Court said in *Roth* that obscenity is to be defined by reference to 'community standards,' it meant community standards -- not a national standard, as is sometimes argued. I believe that there is no provable 'national standard.' . . . At all events, this Court has not been able to enunciate one, and it would be unreasonable to expect local courts to divine one."

It is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas, or New York City. [Footnote 13]

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See Hoyt v. Minnesota, 399 U.S. at 524-525 (1970) (BLACKMUN, J., dissenting); *Walker v. Ohio*, 398 U.S. at 434 (1970) (BURGER, C.J., dissenting); *id.* at 434-435 (Harlan, J., dissenting); *Cain v. Kentucky*, 397 U. S. 319 (1970) (BURGER, C.J., dissenting); *id.* at 397 U. S. 319-320 (Harlan, J., dissenting); *United States v. Groner*, 479 F.2d at 581-583; O'Meara & Shaffer, *Obscenity in The Supreme Court: A Note on Jacobellis v. Ohio*, 40 Notre Dame Law. 1, 6-7 (1964). *See also Memoirs v. Massachusetts*, 383 U.S. at 383 U. S. 458 (Harlan, J., dissenting); *Jacobellis v. Ohio*, *supra*, at 378 U. S. 203-204 (Harlan, J., dissenting); *Roth v. United States*, *supra*, at 354 U. S. 505-506 (Harlan, J., concurring and dissenting). People in different States vary in their tastes and attitudes, and this diversity is not to be strangled by the absolutism of imposed uniformity. As the Court made clear in *Mishkin v. New York*, 383 U.S. at 383 U. S. 508-509, the primary concern with requiring a jury to apply the standard of "the average person, applying contemporary community standards" is to be certain that, so far as material is not aimed at a deviant group, it will be judged by its impact on an average person, rather than a particularly susceptible or sensitive person -- or indeed a totally insensitive one. *See Roth v. United States*, *supra*, at 354 U. S. 489. *Cf.* the now discredited test in *Regina v. Hicklin*, [1868] L.R. 3 Q.B. 360. We hold that the requirement that the jury evaluate the materials with reference to "contemporary

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standards of the State of California" serves this protective purpose and is constitutionally adequate. [Footnote 14]

IV

The dissenting Justices sound the alarm of repression. But, in our view, to equate the free and robust exchange of ideas and political debate with commercial exploitation of obscene material demeans the grand conception of the First Amendment and its high purposes in the historic struggle for freedom. It is a "misuse of the great guarantees of free speech and free press. . . ." *Breard v. Alexandria*, 341 U.S. at 341 U. S. 645. The First Amendment protects works which, taken as a whole, have serious literary, artistic, political, or scientific value, regardless of whether the government or a majority of the people approve of the ideas these works represent.

"The protection given speech and press was fashioned to assure unfettered interchange of *ideas* for the bringing about of

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political and social changes desired by the people,"

Roth v. United States, *supra*, at 354 U. S. 484 (emphasis added). *See Kois v. Wisconsin*, 408 U.S. at 408 U. S. 230-232; *Thornhill v. Alabama*, 310 U.S. at 310 U. S. 101-102. But the public portrayal of hard-core sexual conduct for its own sake, and for the ensuing commercial gain, is a different matter. [Footnote 15]

There is no evidence, empirical or historical, that the stern 19th century American censorship of public distribution and display of material relating to sex, *see Roth v. United States*, *supra*, at 354 U. S. 482-485, in any way limited or affected expression of serious literary, artistic, political, or scientific ideas. On the contrary, it is beyond any question that the era following Thomas Jefferson to Theodore Roosevelt was an "extraordinarily vigorous period" not just in economics and politics, but in *belles lettres* and in "the outlying fields of social and political philosophies." [Footnote 16] We do not see the harsh hand

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of censorship of ideas -- good or bad, sound or unsound -- and "repression" of political liberty lurking in every state regulation of commercial exploitation of human interest in sex.

MR. JUSTICE BRENNAN finds "it is hard to see how state-ordered regimentation of our minds can ever be forestalled." *Paris Adult Theatre I v. Slaton*, *post*, at 413 U. S. 110 (BRENNAN, J., dissenting). These doleful anticipations assume that courts cannot

(BRENNAN, J., dissenting). These general anticipations assume that courts cannot distinguish commerce in ideas, protected by the First Amendment, from commercial exploitation of obscene material. Moreover, state regulation of hard-core pornography so as to make it unavailable to nonadults, a regulation which MR. JUSTICE BRENNAN finds constitutionally permissible, has all the elements of "censorship" for adults; indeed even more rigid enforcement techniques may be called for with such dichotomy of regulation. *See Interstate Circuit, Inc. v. Dallas*, 390 U.S. at 390 U. S. 690. [Footnote 17] One can concede that the "sexual revolution" of recent years may have had useful byproducts in striking layers of prudery from a subject long irrationally kept from needed ventilation. But it does not follow that no regulation of patently offensive "hard core" materials is needed or permissible; civilized people do not allow unregulated access to heroin because it is a derivative of medicinal morphine.

In sum, we (a) reaffirm the *Roth* holding that obscene material is not protected by the First Amendment; (b) hold that such material can be regulated by the States, subject to the specific safeguards enunciated

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above, without a showing that the material is "utterly without redeeming social value"; and (c) hold that obscenity is to be determined by applying "contemporary community standards," *see Kois v. Wisconsin, supra*, at 408 U. S. 230, and *Roth v. United States, supra*, at 354 U. S. 489, not "national standards." The judgment of the Appellate Department of the Superior Court, Orange County, California, is vacated and the case remanded to that court for further proceedings not inconsistent with the First Amendment standards established by this opinion. *See United States v. 12 200-ft. Reels of Film, post* at 413 U. S. 130 n. 7.

Vacated and remanded.

[Footnote 1]

At the time of the commission of the alleged offense, which was prior to June 25, 1969, §§ 311.2(a) and 311 of the California Penal Code read in relevant part:

"§ 311.2 Sending or bringing into state for sale or distribution; printing, exhibiting, distributing or possessing within state"

"(a) Every person who knowingly: sends or causes to be sent, or brings or causes to be brought, into this state for sale or distribution, or in this state prepares, publishes, prints, exhibits, distributes, or offers to distribute, or has in his possession with intent to distribute

or to exhibit or offer to distribute, any obscene matter is guilty of a misdemeanor. . . ."

"§ 311. Definitions"

"As used in this chapter: "

"(a) 'Obscene' means that to the average person, applying contemporary standards, the predominant appeal of the matter, taken as a whole, is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion, which goes substantially beyond customary limits of candor in description or representation of such matters and is matter which is utterly without redeeming social importance."

"(b) 'Matter' means any book, magazine, newspaper, or other printed or written material or any picture, drawing, photograph, motion picture, or other pictorial representation or any statue or other figure, or any recording, transcription or mechanical, chemical or electrical reproduction or any other articles, equipment, machines or materials."

"(c) 'Person' means any individual, partnership, firm, association, corporation, or other legal entity."

"(d) 'Distribute' means to transfer possession of, whether with or without consideration."

"(e) 'Knowingly' means having knowledge that the matter is obscene."

Section 311(e) of the California Penal Code, *supra*, was amended on June 25, 1969, to read as follows:

"(e) 'Knowingly' means being aware of the character of the matter."

Cal. Amended Stats.1969, c. 249, § 1, p. 598. Despite appellant's contentions to the contrary, the record indicates that the new § 311(e) was not applied *ex post facto* to his case, but only the old § 311(e) as construed by state decisions prior to the commission of the alleged offense. *See People v. Pinkus*, 256 Cal. App. 2d 941, 948-950, 63 Cal. Rptr. 680, 685-686 (App. Dept., Superior Ct., Los Angeles, 1967); *People v. Campise*, 242 Cal. App. 2d 905, 914, 51 Cal. Rptr. 815, 821 (App. Dept., Superior Ct., San Diego, 1966). *Cf. Bouie v. City of Columbia*, 378 U. S. 347 (1964). Nor did § 311.2, *supra*, as applied, create any "direct, immediate burden on the performance of the postal functions," or infringe on congressional commerce powers under Art. I, § 8, cl. 3. *Roth v. United States*, 354 U. S. 476, 354 U. S. 494 (1957), quoting *Railway Mail Assn. v. Corsi*, 326 U. S. 88, 326 U. S. 96 (1945). *See also Mishkin v. New York*, 383 U. S. 502, 383 U. S. 506 (1966); *Smith v. California*, 361 U. S. 147, 361 U. S. 150-152 (1959).

[Footnote 2]

This Court has defined "obscene material" as "material which deals with sex in a manner appealing to prurient interest," *Roth v. United States, supra*, at 354 U. S. 487, but the *Roth* definition does not reflect the precise meaning of "obscene" as traditionally used in the English language. Derived from the Latin *obscaenus* *ob*, to, plus *caenum*, filth, "obscene" is defined in the Webster's Third New International Dictionary (Unabridged 1969) as

"1a: disgusting to the senses . . . b: grossly repugnant to the generally accepted notions of what is appropriate . . . 2: offensive or revolting as countering or violating some ideal or principle."

The Oxford English Dictionary (1933 ed.) gives a similar definition, "[o]ffensive to the senses, or to taste or refinement; disgusting, repulsive, filthy, foul, abominable, loathsome."

The material we are discussing in this case is more accurately defined as "pornography" or "pornographic material." "Pornography" derives from the Greek (*porne*, harlot, and *graphos*, writing). The word now means

"1: a description of prostitutes or prostitution 2: a depiction (as in writing or painting) of licentiousness or lewdness: a portrayal of erotic behavior designed to cause sexual excitement."

Webster's Third New International Dictionary, *supra*. Pornographic material which is obscene forms a sub-group of all "obscene" expression, but not the whole, at least as the word "obscene" is now used in our language. We note, therefore, that the words "obscene material," as used in this case, have a specific judicial meaning which derives from the *Roth* case, *i.e.*, obscene material "which deals with sex." *Roth, supra*, at 354 U. S. 487. *See also* ALI Model Penal Code § 251.4(1) "Obscene Defined." (Official Draft 1962.)

[Footnote 3]

In the absence of a majority view, this Court was compelled to embark on the practice of summarily reversing convictions for the dissemination of materials that, at least five members of the Court, applying their separate tests, found to be protected by the First Amendment. *Redrup v. New York*, 386 U. S. 767 (1967). Thirty-one cases have been decided in this manner. Beyond the necessity of circumstances, however, no justification has ever been offered in support of the *Redrup* "policy." *See Walker v. Ohio*, 398 U.S. at 398 U. S. 434-435 (1970) (dissenting opinions of BURGER, C.J., and Harlan, J.). The *Redrup* procedure has cast us in the role of an unreviewable board of censorship for the 50 States.

...
subjectively judging each piece of material brought before us.

[Footnote 4]

See the dissenting opinion of MR. JUSTICE BRENNAN in *Paris Adult Theatre I v. Slaton*, *post*, p. 413 U. S. 73.

[Footnote 5]

As Mr. Chief Justice Warren stated, dissenting, in *Jacobellis v. Ohio*, 378 U. S. 184, 378 U. S. 200 (1964):

"For all the sound and fury that the *Roth* test has generated, it has not been proved unsound, and I believe that we should try to live with it -- at least until a more satisfactory definition is evolved. No government -- be it federal, state, or local -- should be forced to choose between repressing all material, including that within the realm of decency, and allowing unrestrained license to publish any material, no matter how vile. There must be a rule of reason in this as in other areas of the law, and we have attempted in the *Roth* case to provide such a rule."

[Footnote 6]

See, e.g., Oregon Laws 1971, c. 743, Art. 29, §§ 255-262, and Hawaii Penal Code, Tit. 37, §§ 1210-1216, 1972 Hawaii Session Laws, Act 9, c. 12, pt. II, pp. 126-129, as examples of state laws directed at depiction of defined physical conduct, as opposed to expression. Other state formulations could be equally valid in this respect. In giving the Oregon and Hawaii statutes as examples, we do not wish to be understood as approving of them in all other respects nor as establishing their limits as the extent of state power.

We do not hold, as MR. JUSTICE BRENNAN intimates, that all States other than Oregon must now enact new obscenity statutes. Other existing state statutes, as construed heretofore or hereafter, may well be adequate. See *United States v. 12 200-ft. Reel of Film*, *post*, at 413 U. S. 130 n. 7.

[Footnote 7]

"A quotation from Voltaire in the flyleaf of a book will not constitutionally redeem an otherwise obscene publication. . . ." *Kois v. Wisconsin*, 408 U. S. 229, 408 U. S. 231 (1972). See *Memoirs v. Massachusetts*, 383 U. S. 413, 383 U. S. 461 (1966) (WHITE, J., dissenting). We also reject, as a constitutional standard, the ambiguous concept of "social importance." See *id.* at 383 U. S. 462 (WHITE, J., dissenting).

[Footnote 8]

Although we are not presented here with the problem of regulating lewd public conduct itself, the States have greater power to regulate nonverbal, physical conduct than to suppress depictions or descriptions of the same behavior. In *United States v. O'Brien*, 391 U. S. 367, 391 U. S. 377 (1968), a case not dealing with obscenity, the Court held a State regulation of conduct which itself embodied both speech and nonspeech elements to be

"sufficiently justified if . . . it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."

See California v. LaRue, 409 U. S. 109, 409 U. S. 117-118 (1972).

[Footnote 9]

The mere fact juries may reach different conclusions as to the same material does not mean that constitutional rights are abridged. As this Court observed in *Roth v. United States*, 354 U.S. at 354 U. S. 492 n. 30,

"it is common experience that different juries may reach different results under any criminal statute. That is one of the consequences we accept under our jury system. *Cf. Dunlop v. United States*, 165 U. S. 486, 165 U. S. 499-500."

[Footnote 10]

As MR. JUSTICE BRENNAN stated for the Court in *Roth v. United States*, *supra* at 354 U. S. 491-492:

"Many decisions have recognized that these terms of obscenity statutes are not precise. [Footnote omitted.] This Court, however, has consistently held that lack of precision is not itself offensive to the requirements of due process. ' . . . [T]he Constitution does not require impossible standards; all that is required is that the language 'conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. . . . ' *United States v. Petrillo*, 332 U. S. 1, 332 U. S. 7-8. These words, applied according to the proper standard for judging obscenity, already discussed, give adequate warning of the conduct proscribed and mark"

" . . . boundaries sufficiently distinct for judges and juries fairly to administer the law. . . .

That there may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls is no sufficient reason to hold the language too ambiguous to define a criminal offense. . . ."

"*Id.* at 332 U. S. 7. See also *United States v. Harriss*, 347 U. S. 612, 347 U. S. 624, n. 15; *Boyce Motor Lines, Inc. v. United States*, 342 U. S. 337, 342 U. S. 340; *United States v. Ragen*, 314 U. S. 513, 314 U. S. 523-524; *United States v. Wurzbach*, 280 U. S. 396; *Hygrade Provision Co. v. Sherman*, 266 U. S. 497; *Fox v. Washington*, 236 U. S. 273; *Nash v. United States*, 229 U. S. 373."

[Footnote 11]

We must note, in addition, that any assumption concerning the relative burdens of the past and the probable burden under the standards now adopted is pure speculation.

[Footnote 12]

The record simply does not support appellant's contention, belatedly raised on appeal, that the State's expert was unqualified to give evidence on California "community standards." The expert, a police officer with many years of specialization in obscenity offenses, had conducted an extensive state-wide survey and had given expert evidence on 26 occasions in the year prior to this trial. Allowing such expert testimony was certainly not constitutional error. *Cf. United States v. Augenblick*, 393 U. S. 348, 393 U. S. 356 (1969).

[Footnote 13]

In *Jacobellis v. Ohio*, 378 U. S. 184 (1964), two Justices argued that application of "local" community standards would run the risk of preventing dissemination of materials in some places because sellers would be unwilling to risk criminal conviction by testing variations in standards from place to place. *Id.* at 378 U. S. 193-195 (opinion of BRENNAN, J., joined by Goldberg, J.). The use of "national" standards, however, necessarily implies that materials found tolerable in some places, but not under the "national" criteria, will nevertheless be unavailable where they are acceptable. Thus, in terms of danger to free expression, the potential for suppression seems at least as great in the application of a single nationwide standard as in allowing distribution in accordance with local tastes, a point which Mr. Justice Harlan often emphasized. See *Roth v. United States*, 354 U.S. at 354 U. S. 506.

Appellant also argues that adherence to a "national standard" is necessary "in order to avoid unconscionable burdens on the free flow of interstate commerce." As noted *supra* at 413 U. S. 18 n. 1, the application of domestic state police powers in this case did not intrude on any congressional powers under Art. I, § 8, cl. 3, for there is no indication that appellant's

on any congressional powers under Art. I, § 8, cl. 3, for there is no indication that appellant's materials were ever distributed interstate. Appellant's argument would appear without substance in any event. Obscene material may be validly regulated by a State in the exercise of its traditional local power to protect the general welfare of its population despite some possible incidental effect on the flow of such materials across state lines. *See, e.g., Head v. New Mexico Board*, 374 U. S. 424 (1963); *Huron Portland Cement Co. v. Detroit*, 362 U. S. 440 (1960); *Breard v. Alexandria*, 341 U. S. 622 (1951); *H. P. Hood & Sons v. Du Mond*, 336 U. S. 525 (1949); *Southern Pacific Co. v. Arizona*, 325 U. S. 761 (1945); *Baldwin v. G.A.F. Seelig, Inc.*, 294 U. S. 511 (1935); *Sligh v. Kirkwood*, 237 U. S. 52 (1915).

[Footnote 14]

Appellant's jurisdictional statement contends that he was subjected to "double jeopardy" because a Los Angeles County trial judge dismissed, before trial, a prior prosecution based on the same brochures, but apparently alleging exposures at a different time in a different setting. Appellant argues that, once material has been found not to be obscene in one proceeding, the State is "collaterally estopped" from ever alleging it to be obscene in a different proceeding. It is not clear from the record that appellant properly raised this issue, better regarded as a question of procedural due process than a "double jeopardy" claim, in the state courts below. Appellant failed to address any portion of his brief on the merits to this issue, and appellee contends that the question was waived under California law because it was improperly pleaded at trial. Nor is it totally clear from the record before us what collateral effect the pretrial dismissal might have under state law. The dismissal was based, at least in part, on a failure of the prosecution to present affirmative evidence required by state law, evidence which was apparently presented in this case. Appellant's contention, therefore, is best left to the California courts for further consideration on remand. The issue is not, in any event, a proper subject for appeal. *See Mishkin v. New York*, 383 U. S. 502, 383 U. S. 512-514 (1966).

[Footnote 15]

In the apt words of Mr. Chief Justice Warren, appellant in this case was

"plainly engaged in the commercial exploitation of the morbid and shameful craving for materials with prurient effect. I believe that the State and Federal Governments can constitutionally punish such conduct. That is all that these cases present to us, and that is all we need to decide."

Roth v. United States, *supra*, at 354 U. S. 496 (concurring opinion).

[Footnote 16]

[Footnote 16]

See 2 V. Parrington, *Main Currents in American Thought ix et seq.* (1930). As to the latter part of the 19th century, Parrington observed

"A new age had come and other dreams -- the age and the dreams of a middle-class sovereignty. . . . From the crude and vast romanticisms of that vigorous sovereignty emerged eventually a spirit of realistic criticism, seeking to evaluate the worth of this new America, and discover if possible other philosophies to take the place of those which had gone down in the fierce battles of the Civil War."

Id. at 474. Cf. 2 S. Morison, H. Commager & W. Leuchtenburg, *The Growth of the American Republic* 197-233 (6th ed.1969); *Paths of American Thought* 123-166, 203-290 (A. Schlesinger & M. White ed.1963) (articles of Fleming, Lerner, Morton & Lucia White, E. Rostow, Samuelson, Kazin, Hofstadter); and H. Wish, *Society and Thought in Modern America* 337-386 (1952).

[Footnote 17]

"[W]e have indicated . . . that, because of its strong and abiding interest in youth, a State may regulate the dissemination to juveniles of, and their access to, material objectionable as to them, but which a State clearly could not regulate as to adults. *Ginsberg v. New York*, . . . [390 U.S. 629 (1968)]."

Interstate Circuit, Inc. v. Dallas, 390 U. S. 676, 390 U. S. 690 (1968) (footnote omitted).

MR. JUSTICE DOUGLAS, dissenting.

I

Today we leave open the way for California [Footnote 2/1] to send a man to prison for distributing brochures that advertise books and a movie under freshly written standards defining obscenity which until today is decision were never the part of any law.

The Court has worked hard to define obscenity and concededly has failed. In *Roth v. United States*, 354 U. S. 476, it ruled that "[o]bscene material is material which deals with sex in a manner appealing to prurient interest." *Id.* at 354 U. S. 487. Obscenity, it was said, was rejected by the First Amendment because it is "utterly without redeeming

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social importance." *Id.* at 354 U. S. 484. The presence of a "prurient interest" was to be determined by "contemporary community standards." *Id.* at 354 U. S. 480. That test it has

determined by contemporary community standards. *Id.* at 384 U. S. 407. That test, it has been said, could not be determined by one standard here and another standard there, *Jacobellis v. Ohio*, 378 U. S. 184, 378 U. S. 194, but "on the basis of a national standard." *Id.* at 378 U. S. 195. My Brother STEWART, in *Jacobellis*, commented that the difficulty of the Court in giving content to obscenity was that it was "faced with the task of trying to define what may be indefinable." *Id.* at 378 U. S. 197.

In *Memoirs v. Massachusetts*, 383 U. S. 413, 383 U. S. 418, the *Roth* test was elaborated to read as follows:

"[T]hree elements must coalesce: it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value."

In *Ginzburg v. United States*, 383 U. S. 463, a publisher was sent to prison, not for the kind of books and periodicals he sold, but for the manner in which the publications were advertised. The "leer of the sensualist" was said to permeate the advertisements. *Id.* at 383 U. S. 468. The Court said,

"Where the purveyor's sole emphasis is on the sexually provocative aspects of his publications, that fact may be decisive in the determination of obscenity."

Id. at 383 U. S. 470. As Mr. Justice Black said in dissent,

"... Ginzburg ... is now finally and authoritatively condemned to serve five years in prison for distributing printed matter about sex which neither Ginzburg nor anyone else could possibly have known to be criminal."

Id. at 383 U. S. 476. That observation by Mr. Justice Black is underlined by the fact that the *Ginzburg* decision was five to four.

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A further refinement was added by *Ginsberg v. New York*, 390 U. S. 629, 390 U. S. 641, where the Court held that "it was not irrational for the legislature to find that exposure to material condemned by the statute is harmful to minors."

But even those members of this Court who had created the new and changing standards of "obscenity" could not agree on their application. And so we adopted a per curiam treatment of so-called obscene publications that seemed to pass constitutional muster under the

several constitutional tests which had been formulated. *See Redrup v. New York*, 386 U. S. 767. Some condemn it if its "dominant tendency might be to *deprave or corrupt* a reader." [Footnote 2/2] Others look not to the content of the book, but to whether it is advertised "to appeal to the erotic interests of customers." [Footnote 2/3] Some condemn only "hard-core pornography," but even then a true definition is lacking. It has indeed been said of that definition, "I could never succeed in [defining it] intelligibly," but "I know it when I see it." [Footnote 2/4]

Today we would add a new three-pronged test:

"(a) whether 'the average person, applying contemporary community standards,' would find that the work, taken as a whole, appeals to the prurient interest, . . . (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value."

Those are the standards we ourselves have written into the Constitution. [Footnote 2/5] Yet how under these vague tests can

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we sustain convictions for the sale of an article prior to the time when some court has declared it to be obscene?

Today the Court retreats from the earlier formulations of the constitutional test and undertakes to make new definitions. This effort, like the earlier ones, is earnest and well intentioned. The difficulty is that we do not deal with constitutional terms, since "obscenity" is not mentioned in the Constitution or Bill of Rights. And the First Amendment makes no such exception from "the press" which it undertakes to protect nor, as I have said on other occasions, is an exception necessarily implied, for there was no recognized exception to the free press at the time the Bill of Rights was adopted which treated "obscene" publications differently from other types of papers, magazines, and books. So there are no constitutional guidelines for deciding what is and what is not "obscene." The Court is at large because we deal with tastes and standards of literature. What shocks me may

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be sustenance for my neighbor. What causes one person to boil up in rage over one pamphlet or movie may reflect only his neurosis, not shared by others. We deal here with a regime of censorship which, if adopted, should be done by constitutional amendment after

full debate by the people.

Obscenity cases usually generate tremendous emotional outbursts. They have no business being in the courts. If a constitutional amendment authorized censorship, the censor would probably be an administrative agency. Then criminal prosecutions could follow as, if, and when publishers defied the censor and sold their literature. Under that regime, a publisher would know when he was on dangerous ground. Under the present regime -- whether the old standards or the new ones are used -- the criminal law becomes a trap. A brand new test would put a publisher behind bars under a new law improvised by the courts after the publication. That was done in *Ginzburg*, and has all the evils of an *ex post facto* law.

My contention is that, until a civil proceeding has placed a tract beyond the pale, no criminal prosecution should be sustained. For no more vivid illustration of vague and uncertain laws could be designed than those we have fashioned. As Mr. Justice Harlan has said:

"The upshot of all this divergence in viewpoint is that anyone who undertakes to examine the Court's decisions since *Roth* which have held particular material obscene or not obscene would find himself in utter bewilderment."

Interstate Circuit, Inc. v. Dallas, 390 U. S. 676, 390 U. S. 707.

In *Bouie v. City of Columbia*, 378 U. S. 347, we upset a conviction for remaining on property after being asked to leave, while the only unlawful act charged by the statute was entering. We held that the defendants had received no "fair warning, at the time of their conduct"

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while on the property "that the act for which they now stand convicted was rendered criminal" by the state statute. *Id.* at 378 U. S. 355. The same requirement of "fair warning" is due here, as much as in *Bouie*. The latter involved racial discrimination; the present case involves rights earnestly urged as being protected by the First Amendment. In any case -- certainly when constitutional rights are concerned -- we should not allow men to go to prison or be fined when they had no "fair warning" that what they did was criminal conduct.

II

If a specific book, play, paper, or motion picture has in a civil proceeding been condemned as obscene and review of that finding has been completed, and thereafter a person publishes, shows, or displays that particular book or film, then a vague law has been made specific. There would remain the underlying question whether the First Amendment allows

an implied exception in the case of obscenity. I do not think it does, [Footnote 2/6] and my views

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on the issue have been stated over and over again. [Footnote 2/7] But at least a criminal prosecution brought at that juncture would not violate the time-honored "void for vagueness" test. [Footnote 2/8]

No such protective procedure has been designed by California in this case. Obscenity -- which even we cannot define with precision -- is a hodge-podge. To send

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men to jail for violating standards they cannot understand, construe, and apply is a monstrous thing to do in a Nation dedicated to fair trials and due process.

III

While the right to know is the corollary of the right to speak or publish, no one can be forced by government to listen to disclosure that he finds offensive. That was the basis of my dissent in *Public Utilities Comm'n v. Pollak*, 343 U. S. 451, 343 U. S. 467, where I protested against making streetcar passengers a "captive" audience. There is no "captive audience" problem in these obscenity cases. No one is being compelled to look or to listen. Those who enter newsstands or bookstalls may be offended by what they see. But they are not compelled by the State to frequent those places; and it is only state or governmental action against which the First Amendment, applicable to the States by virtue of the Fourteenth, raises a ban.

The idea that the First Amendment permits government to ban publications that are "offensive" to some people puts an ominous gloss on freedom of the press. That test would make it possible to ban any paper or any journal or magazine in some benighted place. The First Amendment was designed "to invite dispute," to induce "a condition of unrest," to "create dissatisfaction with conditions as they are," and even to stir "people to anger." *Terminiello v. Chicago*, 337 U. S. 1, 337 U. S. 4. The idea that the First Amendment permits punishment for ideas that are "offensive" to the particular judge or jury sitting in judgment is astounding. No greater leveler of speech or literature has ever been designed. To give the power to the censor, as we do today, is to make a sharp and radical break with the traditions of a free society. The First Amendment was not fashioned as a vehicle for

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dispensing tranquilizers to the people. Its prime function was to keep debate open to "offensive" as well as to "staid" people. The tendency throughout history has been to subdue the individual and to exalt the power of government. The use of the standard "offensive" gives authority to government that cuts the very vitals out of the First Amendment. [Footnote 2/9] As is intimated by the Court's opinion, the materials before us may be garbage. But so is much of what is said in political campaigns, in the daily press, on TV, or over the radio. By reason of the First Amendment -- and solely because of it -- speakers and publishers have not been threatened or subdued because their thoughts and ideas may be "offensive" to some.

The standard "offensive" is unconstitutional in yet another way. In *Coates v. City of Cincinnati*, 402 U. S. 611, we had before us a municipal ordinance that made it a crime for three or more persons to assemble on a street and conduct themselves "in a manner annoying to persons

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passing by." We struck it down, saying:

"If three or more people meet together on a sidewalk or street corner, they must conduct themselves so as not to annoy any police officer or other person who should happen to pass by. In our opinion, this ordinance is unconstitutionally vague because it subjects the exercise of the right of assembly to an unascertainable standard, and unconstitutionally broad because it authorizes the punishment of constitutionally protected conduct."

"Conduct that annoys some people does not annoy others. Thus, the ordinance is vague not in the sense that it requires a person to conform his conduct to an imprecise but comprehensive normative standard, but rather in the sense that no standard of conduct is specified at all."

Id. at 402 U. S. 614.

How we can deny Ohio the convenience of punishing people who "annoy" others and allow California power to punish people who publish materials "offensive" to some people is difficult to square with constitutional requirements.

If there are to be restraints on what is obscene, then a constitutional amendment should be the way of achieving the end. There are societies where religion and mathematics are the only free segments. It would be a dark day for America if that were our destiny. But the people can make it such if they choose to write obscenity into the Constitution and define it.

We deal with highly emotional, not rational, questions. To many, the Song of Solomon is obscene. I do not think we, the judges, were ever given the constitutional power to make definitions of obscenity. If it is to be defined, let the people debate and decide by a constitutional amendment what they want to ban as obscene and what standards they want the legislatures and the courts to apply. Perhaps the people will decide that the path towards a mature, integrated society requires

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that all ideas competing for acceptance must have no censor. Perhaps they will decide otherwise. Whatever the choice, the courts will have some guidelines. Now we have none except our own predilections.

[Footnote 2/1]

California defines "obscene matter" as

"matter, taken as a whole, the predominant appeal of which to the average person, applying contemporary standards, is to prurient interest, *i.e.*, a shameful or morbid interest in nudity, sex, or excretion; and is matter which taken as a whole goes substantially beyond customary limits of candor in description or representation of such matters; and is matter which taken as a whole is utterly without redeeming social importance."

Calif. Penal Code § 311(a).

[Footnote 2/2]

Roth v. United States, 354 U. S. 476, 354 U. S. 502 (opinion of Harlan, J.).

[Footnote 2/3]

Ginzburg v. United States, 383 U. S. 463, 383 U. S. 467.

[Footnote 2/4]

Jacobellis v. Ohio, 378 U. S. 184, 378 U. S. 197 (STEWART, J., concurring).

[Footnote 2/5]

At the conclusion of a two-year study, the U.S. Commission on Obscenity and Pornography determined that the standards we have written interfere with constitutionally protected materials:

"Society's attempts to legislate for adults in the area of obscenity have not been successful. Present laws prohibiting the consensual sale or distribution of explicit sexual materials to adults are extremely unsatisfactory in their practical application. The Constitution permits material to be deemed 'obscene' for adults only if, as a whole, it appeals to the 'prurient' interest of the average person, is 'patently offensive' in light of 'community standards,' and lacks 'redeeming social value.' These vague and highly subjective aesthetic, psychological and moral tests do not provide meaningful guidance for law enforcement officials, juries or courts. As a result, law is inconsistently and sometimes erroneously applied, and the distinctions made by courts between prohibited and permissible materials often appear indefensible. Errors in the application of the law and uncertainty about its scope also cause interference with the communication of constitutionally protected materials."

Report of the Commission on Obscenity and Pornography 53 (1970).

[Footnote 2/6]

It is said that "obscene" publications can be banned on authority of restraints on communications incident to decrees restraining unlawful business monopolies or unlawful restraints of trade, *Sugar Institute v. United States*, 297 U. S. 553, 297 U. S. 597, or communications respecting the sale of spurious or fraudulent securities. *Hall v. Geier-Jones Co.*, 242 U. S. 539, 242 U. S. 549; *Caldwell v. Sioux Falls Stock Yards Co.*, 242 U. S. 559, 242 U. S. 567; *Merrick v. Halsey & Co.*, 242 U. S. 568, 242 U. S. 584. The First Amendment answer is that, whenever speech and conduct are brigaded -- as they are when one shouts "Fire" in a crowded theater -- speech can be outlawed. Mr. Justice Black, writing for a unanimous Court in *Giboney v. Empire Storage Co.*, 336 U. S. 490, stated that labor unions could be restrained from picketing a firm in support of a secondary boycott which a State had validly outlawed. Mr. Justice Black said:

"It rarely has been suggested that the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute. We reject the contention now."

Id. at 336 U. S. 498.

[Footnote 2/7]

See United States v. 12 200-ft. Reels of Film, post, p. 413 U. S. 123; *United States v. Orito*, post, p. 413 U. S. 139; *Kois v. Wisconsin*, 408 U. S. 229; *Byrne v. Karalexis*, 396 U. S. 976, 977; *Ginsberg v. New York*, 390 U. S. 629, 390 U. S. 650; *Jacobs v. New York*, 388 U. S.

431, 388 U. S. 436; *Ginzburg v. United States*, 383 U. S. 463, 383 U. S. 482; *Memoirs v. Massachusetts*, 383 U. S. 413, 383 U. S. 424; *Bantam Books, Inc. v. Sullivan*, 372 U. S. 58, 372 U. S. 72; *Times Film Corp. v. Chicago*, 365 U. S. 43, 365 U. S. 78; *Smith v. California*, 361 U. S. 147, 361 U. S. 167; *Kingsley Pictures Corp. v. Regents*, 360 U. S. 684, 360 U. S. 697; *Roth v. United States*, 354 U. S. 476, 354 U. S. 508; *Kingsley Books, Inc. v. Brown*, 354 U. S. 436, 354 U. S. 446; *Superior Films, Inc. v. Department of Education*, 346 U. S. 587, 346 U. S. 588; *Gelling v. Texas*, 343 U. S. 60.

[Footnote 2/8]

The Commission on Obscenity and Pornography has advocated such a procedure:

"The Commission recommends the enactment, in all jurisdictions which enact or retain provisions prohibiting the dissemination of sexual materials to adults or young persons, of legislation authorizing prosecutors to obtain declaratory judgments as to whether particular materials fall within existing legal prohibitions. . . ."

"A declaratory judgment procedure . . . would permit prosecutors to proceed civilly, rather than through the criminal process, against suspected violations of obscenity prohibition. If such civil procedures are utilized, penalties would be imposed for violation of the law only with respect to conduct occurring after a civil declaration is obtained. The Commission believes this course of action to be appropriate whenever there is any existing doubt regarding the legal status of materials; where other alternatives are available, the criminal process should not ordinarily be invoked against persons who might have reasonably believed, in good faith, that the books or films they distributed were entitled to constitutional protection, for the threat of criminal sanctions might otherwise deter the free distribution of constitutionally protected material."

Report of the Commission on Obscenity and Pornography 63 (1970).

[Footnote 2/9]

Obscenity law has had a capricious history:

"The white slave traffic was first exposed by W. T. Stead in a magazine article, 'The Maiden Tribute.' The English law did absolutely nothing to the profiteers in vice, but put Stead in prison for a year for writing about an indecent subject. When the law supplies no definite standard of criminality, a judge, in deciding what is indecent or profane, may consciously disregard the sound test of present injury, and proceeding upon an entirely different theory may condemn the defendant because his words express ideas which are thought liable to cause bad future consequences. Thus, musical comedies, which almost invariably discuss

cause bad future consequences. Thus, musical comedies enjoy almost unbridled license, while a problem play is often forbidden because opposed to our views of marriage. In the same way, the law of blasphemy has been used against Shelley's *Queen Mab* and the decorous promulgation of pantheistic ideas on the ground that to attack religion is to loosen the bonds of society and endanger the state. This is simply a round-about modern method to make heterodoxy in sex matters and even in religion a crime."

Z. Chafee, *Free Speech in the United States* 151 (1942).

MR. JUSTICE BRENNAN, with whom MR. JUSTICE STEWART and MR. JUSTICE MARSHALL join, dissenting.

In my dissent in *Paris Adult Theatre I v. Slaton*, post, p. 413 U. S. 73, decided this date, I noted that I had no occasion to consider the extent of state power to regulate the distribution of sexually oriented material to juveniles or the offensive exposure of such material to consenting adults. In the case before us, appellant was convicted of distributing obscene matter in violation of California Penal Code § 311.2, on the basis of evidence that he had caused to be mailed unsolicited brochures advertising various books and a movie. I need not now decide whether a statute might be drawn to impose, within the requirements of the First Amendment, criminal penalties for the precise conduct at issue here. For it is clear that, under my dissent in *Paris Adult Theatre I*, the statute under which the prosecution was brought is unconstitutionally overbroad, and therefore invalid on its face. *

"[T]he transcendent value to all society of constitutionally protected expression is deemed to justify allowing 'attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity.'"

Gooding v. Wilson, 405 U. S. 518, 405 U. S. 521 (1972), quoting

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from *Dombrowski v. Pfister*, 380 U. S. 479, 380 U. S. 486 (1965). See also *Baggett v. Bullitt*, 377 U. S. 360, 377 U. S. 366 (1964); *Coates v. City of Cincinnati*, 402 U. S. 611, 402 U. S. 616 (1971); *id.* at 402 U. S. 619-620 (WHITE, J., dissenting); *United States v. Raines*, 362 U. S. 17, 362 U. S. 21-22 (1960); *NAACP v. Button*, 371 U. S. 415, 371 U. S. 433 (1963). Since my view in *Paris Adult Theatre I* represents a substantial departure from the course of our prior decisions, and since the state courts have as yet had no opportunity to consider whether a "readily apparent construction suggests itself as a vehicle for rehabilitating the [statute] in a single prosecution." *Dombrowski v. Pfister*, supra, at 380 U. S. 481, I would

[statute] in a single prosecution, *Dombrowski v. Pfister*, *supra*, at 380 U. S. 491, I would reverse the judgment of the Appellate Department of the Superior Court and remand the case for proceedings not inconsistent with this opinion. *See Coates v. City of Cincinnati*, *supra*, at 402 U. S. 616.

* Cal. Penal Code § 311.2(a) provides that

"Every person who knowingly: sends or causes to be sent, or brings or causes to be brought, into this state for sale or distribution, or in this state prepares, publishes, prints, exhibits, distributes, or offers to distribute, or has in his possession with intent to distribute or to exhibit or offer to distribute, any obscene matter is guilty of a misdemeanor."

Materials

Oral Arguments

Oral Argument - January 19, 1972

Oral Argument - January 18, 1972

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Newton Arvin

Pride Month: Newton Arvin

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In honor of Newton Arvin, I dedicate this blog to the struggles, both personal and community-wide in the LGBTQ+ population, and to celebrate this year's Pride month. Arvin was a native of Valparaiso, Porter County, Indiana, identified above by the courthouse he would have passed during his younger years spent in Indiana.

Recent Entries

NOVEMBER 2024

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Flying High: Aviation History Month

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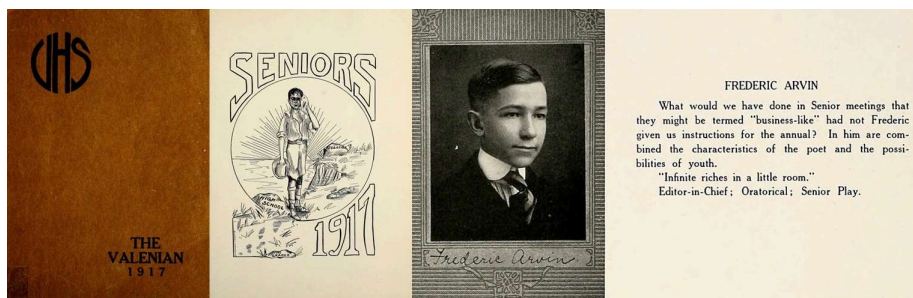
Are We Related?: Cheek

Celebration Days in September

County Extension Agents during World War II

Lately, I have given myself over to noting some fun month celebrations as designated by nationaldaycalendar.com. This month I have deferred that celebratory blog to my colleague, Cooper Davis, who will tell you all about our collection items related to National Dairy Month. However, blogs can't always be about light-hearted topics, as much as I wish they could. And while history does include fun moments, it also accounts for trials and tribulations over time.

I recently conducted some research about Indiana authors. I was looking primarily for books authored by Hoosiers, and more specifically those also related to Indiana by topic or setting. I stumbled upon an Indiana author I was not familiar with, Newton Arvin. Arvin did not publish books about Indiana, but his formative years, from birth until age 17, and then at various times throughout his Harvard University years, were spent in Valparaiso. As quoted from his correspondence in Barry Werth's *The Scarlet Professor*, Arvin did not have a fond connection with his hometown: "I don't think I've ever hated this burg so as I have since I got back this time, I can't imagine any atmosphere more oppressive than a small town like this."

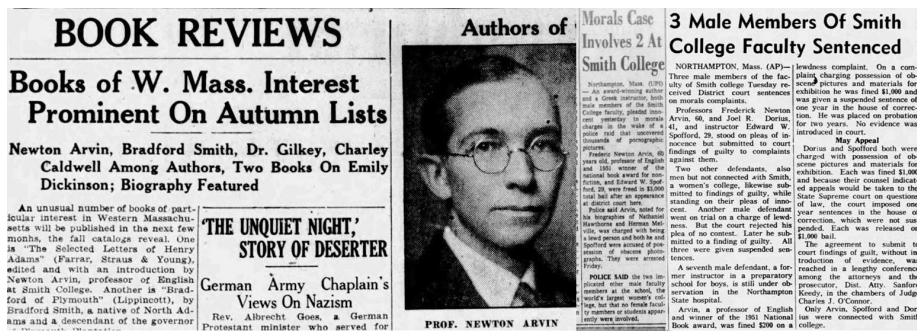


Selection of images from the 1917 Valparaiso High School Yearbook, *The Valenian*: Cover, Seniors page, Excerpted page showing Frederic Arvin (later known as Newton Arvin). Ancestry Library Edition, May 2024.

Arvin graduated from Harvard in 1921. Upon graduation, he taught at a day school in Detroit for one year, before accepting a position in the English Department at Smith College. Arvin was best known for his literary critique and biographies of authors such as Hawthorne, Whitman, Melville, and others. In 1932, he married Mary Garrison, a native of Connecticut, and his former student. The pair struggled with their relationship and divorced in 1940. Likely, one of the many reasons that his marriage to Garrison did not work, despite his wanting it to, was because of his true love: men.

Arvin, living in a time when it was not safe (or legal) to live as an openly gay man, was internally conflicted. Nonetheless, he had various documented relationships with men over time, which he noted in his correspondence and diaries. One of his most well-known relationships was a love affair with Truman Capote starting in 1946. Capote's first novel, *Other Voices, Other Rooms* (1948), was dedicated to Arvin, with whom he remained friends after their romance ended. Ultimately though, his identity as a gay man and sharing this part of himself with others would facilitate the end of his career.





Newspaper articles about Arvin, one regarding Massachusetts interest books by Arvin and others, *Morning Union*, Springfield, MA, 26 August 1951, one from the arrest of Arvin and others, as appearing in the *Indianapolis Star*, 4 September 1960, one from the sentencing of Arvin and others, as appearing in the *Richmond Palladium-Item*, 20 September 1960. Accessed from Newspapers.com, June 2024.

The 1960s, while often thought of for the idea of "Free Love" which began in the latter part of the decade, early on, it did not always embrace those ideas. Much stricter and more rigid rules reigned, in a legal sense at least. Persecution of homosexuals was underway specifically in Northampton, MA, the location of Smith College, at the same time the US Postmaster General was cracking down on the sending materials deemed obscene, especially homoerotic imagery, through the US postal service. Possessing these to show to others was also a crime. In September 1960, Arvin and two of his colleagues were arrested and convicted of sharing these images with others, convictions that were eventually overturned, but not before the damage was done. All three lost their positions at the college. Afterwards, Arvin further struggled with his physical and mental health, which was already tenuous, and died just three years later of pancreatic cancer.



Digital images representing the IHS LGBTQ+ Collecting Initiative: Cover of *The Works* magazine featuring Nurse Safe Sex, March 1986; Bat'n Rouge Softball Fundraiser, 2010; Judge David J. Dryer, Marion County Superior Court, riding in Pride Parade, 2013. Bohr/Indy Pride/Gonzalez Collection, IHS; Mark A. Lee LGBT Photo Collection, IHS; Courtesy of NUVO, Mark A. Lee LGBT Photo Collection, IHS.

Join me in exploring more about Newton Arvin as I read Barry Werth's *The Scarlet Professor: Newton Arvin: A Literary Life Shattered by Scandal*, coming to the IHS collection later this year. You can also explore other informative resources online at [Smith University](#), on [Wikipedia](#), [GBLTQ.com](#) an online "encyclopedia of gay, lesbian, bisexual, transgender, and queer culture and history," and more. To learn more about images and items from the Indiana Historical Society's LGBTQ+ collecting initiative visit our [digital collection](#) and [library catalog](#).



Amy Vedra is the director of reference services. She is currently reading her way through the Great American Reads list.

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Arvin, Newton (1900-1963)

by Claude J. Summers

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Newton Arvin was one of the most gifted critics of American literature of the mid-twentieth century. Not only did he write penetrating studies of major American writers, including Hawthorne, Whitman, Melville, and Longfellow, but he also helped demonstrate the persistent value of a kind of criticism that incorporates historical, political, and biographical contexts.

Today, however, he is most remembered as a lover and mentor of the young Truman Capote and as the central figure in a 1960 scandal at Smith College that involved pornography, homosexuality, and betrayal.

He was born Frederick Newton Arvin in Valparaiso, Indiana on August 23, 1900, the fourth of six children of a businessman and his long-suffering wife. A precocious boy, he spent a lonely childhood, alienated from his father who considered him effeminate and weak and from his distant, embittered mother.

Until he developed a friendship with a boy his own age, David Lilienthal, who would go on to become a successful lawyer, chairman of the Tennessee Valley Authority, and head of the Atomic Energy Commission, Arvin considered himself "uniquely misbegotten." Derided by his classmates for his bookishness and lack of interest in sports, he was happy to escape Valparaiso for Harvard in 1917.

At Harvard, Arvin blossomed. There he compiled a brilliant academic record--graduating both Phi Beta Kappa and *summa cum laude*--and developed his first adult crush on another young man. He also came under the influence of literary critic Van Wyck Brooks, a socialist whose criticism was politically engaged. The idea that literary criticism could also be social criticism inspired Arvin to devote his life to being "a standard-bearer, conscience, and champion of American literature, a neophyte in Brooks's priesthood," as Barry Werth describes his career choice.

After a brief stint teaching in high school and writing for left-wing magazines, at the age of 22, Arvin began teaching at Smith College in Northampton, Massachusetts. He had planned to stay for only a few years, but wound up spending some 37 years on the faculty there.

Although he frequently complained about the constraints of living in Northampton, which was then a stodgy and conservative town, he appreciated the College's liberal traditions, especially as tested during the McCarthy era, when Smith resisted pressure to fire faculty who had been members of the Communist Party or, like Arvin himself, so-called "fellow travelers."

Although Arvin never became a very good classroom teacher, he soon earned a reputation as a distinguished critic and brought luster to Smith's American Studies program, which became one of the best in the country.

By the time he arrived at Smith, Arvin was well aware of his homosexuality. But he regarded his sexuality as something shameful, a "loathsome affliction" as he would describe it in his diary. At various times in his life, he was more or less comfortable with his homosexuality, but the shame with which he regarded it never completely dissipated.

The guilt he felt for his homosexual desires may explain his 1932 marriage to a former student of his at Smith, Mary Garrison. Predictably incompatible, the lively young woman and the reclusive professor who most valued solitude were unable to live together. She eventually suffered a nervous breakdown and divorced him.

Arvin himself was subject to breakdowns throughout most of his life. He frequently sought refuge in private sanitariums and, in several instances, at the state mental hospital in Northampton. He underwent several treatments designed to "cure" his homosexuality, including psychoanalysis, electroconvulsive therapy, and a regimen of confession and prayer.

Arvin's Criticism

Despite his emotional instability, Arvin nevertheless produced three major works of criticism. Oscar Wilde's dictum that literary criticism is the sincerest form of autobiography is especially apt in the case of Arvin, whose criticism evinces an unusual degree of identification with his subjects. His critical biographies of Hawthorne, Whitman, and Melville are extremely revealing of Arvin himself. By looking at these major figures through the prism of his own tortured psyche, he not only exposed previously unrecognized dimensions of their work, but also (inadvertently) laid bare aspects of his own consciousness, including especially his homosexuality.

Hawthorne (1929) established Arvin's reputation as a discerning critic who could probe beneath the surfaces of his subjects to discover hitherto unacknowledged depths. In this book, he explores Hawthorne's fraught relationship with Melville, thus anticipating what would become a recurrent subject in American literary scholarship and also in gay studies. He also finds in Hawthorne the same insecurity regarding masculinity that he himself felt.

Most tellingly, Arvin brilliantly (and revealingly) identifies secrecy and concealment as the keys to understanding Hawthorne's life and work, qualities that the critic--and other homosexuals in a homophobic society--knew first hand and all too well. As Werth observes, "In reading Hawthorne, Arvin identified dark strains that perhaps only someone who cloaked unwanted desires could fully detect."

Similarly, Arvin's study of Whitman is also revealing of both author and subject. In 1938, when Arvin's *Whitman* appeared, the poet's reputation had declined as the result of homophobic attacks, such as those of Mark Van Doren, who argued that Whitman's homosexuality undermined the value of his poetry. Reducing Whitman's poetry to "the unwitting expression of his own abnormal sexuality" rather than seeing it as an expression of political and social progressivism, Van Doren found nothing worthwhile in *Leaves of Grass*. In effect, Arvin wrote his book to rebut Van Doren and to answer the question whether "Whitman's whole prophecy as a democratic poet--and especially the poet of 'universal democratic comradeship'--is invalidated by having its psychological basis in a sexual aberration?"

Arvin reaches the conclusion that "splendid fruits may be grown in . . . bitter and unlikely soil." He forthrightly asserts that the "fact of Whitman's homosexuality" cannot be "denied by any informed reader of the 'Calamus' poems." But rather than affirming the poet's sexuality, he contends that "what interests us in Whitman was not that he was homosexual, but that unlike the vast majority of inverts, even of those creatively gifted, he chose to translate and sublimate his strange, anomalous emotional experience into a political, a constructive, a democratic program." At another point, when discussing Whitman's "Calamus" poems, he observes that "There is, so to say, a harmless, wholesome, sane 'homosexuality' that pervades normal humanity as the mostly powerless bacilli of tuberculosis appear in the healthiest of lungs."

Arvin thus defends Whitman's value as a poet on the grounds that he (unlike most other gifted "inverts")

transcended his homosexuality. In so doing, however, Arvin reveals his deep ambivalence about homosexuality (his own as well as Whitman's), likening it to "bitter and unlikely soil" and to tuberculosis bacilli. By making Whitman an exception, he concedes the assumption that their "sexual aberration" renders most homosexuals incapable of socially advanced vision.

While Arvin asserts the possibility that homosexuals are capable of creating splendid fruit from the bitter soil of their affliction and defends at least some versions of homosexuality as harmless and wholesome, he does so in terms that confirm his internalized homophobia. While his comments in effect defend the value not only of Whitman's work, but also his own, despite its also being rooted in the "bitter and unlikely soil" of homosexuality, the defense is less affirmative than negative in regards to his sexuality.

Similarly, in *Melville* (1950) Arvin presents homosexuality as pathology, a "malady" that Melville only dimly understood. "He was conscious enough, no doubt, of the ardor and intensity of his feelings for members of his own sex," Arvin writes, "but the possibility that such emotions might have a sexual undercurrent can only with the utmost rarity, and then fleetingly, have presented itself to his consciousness." In his reading of Melville, Arvin both downplays the possibility of Melville's acting upon his homosexual impulses--though he identifies the search for a friend as the novelist's great theme--and also projects onto his subject his own conflicted feelings regarding homosexuality, attributing to Melville a confusion that may have been his own.

As he had in Hawthorne, Arvin also discovers in Melville a fundamental gender conflict. Although Melville sought a homosocial life upon the high seas, he was, unlike Whitman, unable to "hold the feminine at a safe distance while he organized his emotional life around his male companionships." Rather, he needed to marry in order to seek a balance between the masculine and feminine within him. Before his marriage, however, the clash between Melville's needs "was terribly intense, and emotionally speaking . . . this is the central fact behind his work." Arvin, thus, locates the roots of Melville's art in his sexual and gender confusions and conflicts, and explains his puzzling marriage by recourse to the same confusions.

In some ways, Arvin's books are quite brave. At a time when homosexuality was a subject very difficult to broach even in liberal academic circles, Arvin persuasively demonstrated that same-sex desire was central to the work of major American literary figures. He helped end a tradition of silence and denial in literary discourse. He may, thus, deserve the epithet Leland Person tentatively bestows on him, "the father of gay American Renaissance studies."

At the same time, however, his characterization of homosexuality is--perhaps inescapably--couched in the homophobic terms of medical discourse and reflects the attitudes of mid-twentieth-century society. Arvin's approach to homosexuality is revealing of his ambivalence toward his own sexuality, but it also illustrates the extraordinary difficulty of writing about homosexuality--particularly in positive terms--during his lifetime. So pervasive and generalized was homophobia in the academy and in mainstream criticism that even to mention the subject was to arouse suspicion. Moreover, it was almost impossible to conceive of it outside the terms of medical discourse, especially in intellectual circles.

Arvin's criticism bears some resemblance to that of F. O. Matthiessen, his contemporary who dominated American literary studies from his position at Harvard. Homosexuality was central to both men's work, though Arvin confronted the subject more directly than Matthiessen, whose approach tended to be indirect and subversive. Both men were committed leftists who saw literary criticism as essentially political. They emphasized the social, historical, and biographical contexts of literature. They, thus, opposed the influence of the so-called "New Criticism" that sought to downplay social and biographical elements in favor of textual analysis.

For all their similarities, however, the two men were extremely different in temperament. Moreover, they worked on different scales. Whereas Matthiessen produced magisterial books, especially *American*

Renaissance: Art and Expression in the Age of Emerson and Whitman (1941), a work that almost single-handedly defined the American literary canon for decades, Arvin produced relatively small, exquisitely written, and intensely personal books. In print Matthiessen enthusiastically praised Arvin's books, but privately considered him too timid to be a major force in American studies.

In 1950, Matthiessen, depressed over the death of Russell Cheney, his life-partner, and fearful of the McCarthy-era witch-hunts then underway, committed suicide. Many expected that Arvin would be asked to assume his position at Harvard, especially after Arvin was awarded the 1951 National Book Award for nonfiction for *Melville*. But Arvin, who had recently suffered one of his nervous collapses, rebuffed the invitation to teach at Harvard for a year, and thereby signaled his inability to leave his life at Northampton, however vexatious it had become.

In 1950, Edmund Wilson described Arvin as one of only two students of American literature "who can themselves be called first-rate writers." Because of the grace and power of his prose, as well as the penetration of his insights, Arvin's books are still readable. Indeed, Robert Martin has described *Whitman* as "one of the most enduring works of socialist criticism in American literature."

Arvin and Capote

From 1939 until his disgrace in 1960, Arvin was a frequent guest at Yaddo, the writers' colony in Saratoga, New York. He served as a trustee for many years. At Yaddo, he did some of his best work, and became friends with a number of fellow writers, including especially Carson McCullers and Truman Capote.

In 1946, Arvin and Capote fell in love when both were guests at Yaddo. The precocious twenty-one-year-old Capote, at Yaddo to work on his first novel, *Other Voices, Other Rooms* (1948), which would be dedicated to Arvin, and the forty-six-year-old professor may have been an improbable couple, but they were immediately smitten with each other. Capote found Arvin "a charming person, cultivated in every way, with the most wonderfully subtle mind," while Arvin found "Little T." utterly irresistible, describing him as "a little wizard or magician or alchemist of some wonderful Gothic kind . . . only when you kiss me do I come to life."

The two embarked on an intense love affair, which yielded significant consequences for each. Capote helped Arvin become more open and less ashamed of his homosexuality. He introduced his older lover to gay New York and helped give him a broader frame of reference. Capote, in turn, benefited from Arvin's learning, attending his classes at Smith and meeting (and sometimes shocking) his colleagues. The young novelist, who had not attended college, would later say, "Newton was my Harvard."

Although they two men were in love with each other, their styles were probably too different for them to sustain a love affair for long. Arvin was sometimes embarrassed by Capote's flamboyance, and after the publication of *Other Voices, Other Rooms* made its author a celebrity, he found it difficult to play the part of soothing helpmate.

More decisively, Arvin simply needed more solitude than a full-time relationship could afford. He found it impossible to live with someone else. As Capote, who sought a permanent relationship, came to realize, Arvin was a "weekend caller," unable to maintain a long-term relationship with anyone.

Their affair ended in 1948, but the two remained friends for the rest of Arvin's life.

The Smith College Scandal

After he broke off his relationship with Capote, Arvin became more open and aggressive in seeking sexual contacts. He occasionally spent nights of dissipation at the Everard baths in New York and sometimes frequented the cruising areas of Springfield, Massachusetts, not far from Northampton. These outings left

him alternately exhilarated and filled with self-disgust and shame.

Arvin also began collecting soft-core pornography, including magazines such as *Trim* and *Grecian Guild Pictorial*, which he would sometimes share with younger colleagues. As a result of his purchases of magazines that featured nude or semi-nude young men, Arvin came to the attention of postal authorities, who were in the midst of an antipornography campaign.

On September 2, 1960, three Massachusetts state troopers, accompanied by a postal inspector and a local policeman, knocked on the door of Arvin's apartment. He admitted them and gave them permission to search his premises. The police seized "obscene pictures" and twenty diaries in which Arvin had recorded the details of his sex life, as well as letters from Capote and others.

Most puzzlingly, Arvin freely gave the police the names of friends to whom he had shown the pictures.

Arvin was charged with a felony count of possessing obscene material and also with being "a lewd and lascivious person in speech and behavior." In the days following, the police raided the homes and apartments of others, ultimately charging five other people--including two of Arvin's younger colleagues at Smith--with crimes stemming from the investigation.

The news of Arvin's arrest set off a panic among homosexuals in the Northeast. Many individuals destroyed their collections of pornography, as well as other images that might conceivably be considered pornographic.

One of Smith's most illustrious faculty members, architectural historian Henry Russell Hitchcock, was known to have a collection of magazines such as *Tomorrow's Man* and *Strength and Health* and letters from other homosexuals, including the composer Virgil Thomson, recounting their sexual exploits. Hitchcock was in Europe at the time, but his house-sitter, realizing that Hitchcock might be in danger, destroyed pictures, magazines, letters, and other documents.

Young English instructor William Stacey Johnson, who had been a close friend of Arvin and had seen some of his magazines, not only destroyed his own pornography, but discreetly left town.

As it turned out, thanks largely to a District Attorney who sensibly wanted to minimize the misery that the utterly unnecessary scandal would cause, the court proceedings turned out to be less sensational than the news accounts--with their lurid headlines announcing the presence of a vice ring in staid Northampton--promised.

Through a deal made with the attorneys of the men involved, the District Attorney agreed not to ask for prison time for the defendants, who would be subjected to suspended jail terms and fines. He also agreed not to force the defendants to endure a full-scale trial in which their sexual activities would be detailed and dissected. (This last promise was at least partially broken when the most zealous policeman involved in the investigation read a signed confession from one of the defendants admitting that he had committed homosexual acts with Arvin and another defendant over the last two years.)

Arvin was sentenced to a suspended one-year jail term, fined \$1,000 on the obscenity charge, fined an additional \$200 for being a "lewd and lascivious" person, and placed on probation for two years.

Arvin's two young colleagues who were caught up in the affair, Greek scholar Edward "Ned" Spofford and Shakespearean Joel Dorius, were given similar sentences, but, unlike Arvin, they reserved the right to appeal their convictions on constitutional grounds.

Spofford had been one of Arvin's closest friends. He had gently rebuffed the older man's sexual advances, but they had become confidantes. At first he assumed that his home had been raided and he had been arrested as a result of material that the police had discovered in their raid of Arvin's apartment. Only gradually did it dawn on him that Arvin had freely offered up his and Dorius's names.

The question of why Arvin would "name names" is one that continues to haunt those interested in the Smith College scandal. Arvin had followed closely the McCarthyite investigations in which former members of the Communist Party were dragged before congressional committees and pressured to reveal who else had been members of left-wing organizations, so he was not naive. He very well knew both the ethical issues involved in "naming names" and the opprobrium with which members of the Left regarded those who betrayed their friends and colleagues.

The question may never be answered definitively. The only explanation Arvin himself gave was a pregnant comment he made to Spofford on the day of their trial, "I couldn't go through this alone."

Arvin may have been frightened by the thuggish appearance and behavior of the policemen. He may have been so emotionally distraught as not to have been thinking clearly. He may also have been unconsciously motivated by resentment at Spofford's lack of interest in him sexually. Almost certainly, his cooperation with the police was at least partially triggered by the masochistic shame he felt over his homosexuality. In some part of his psyche, he must have regarded his arrest and exposure as a fitting punishment for his "loathsome affliction."

As a result of the scandal, Arvin was forced to retire from Smith College at half-salary.

As the appeals on constitutional grounds of the conviction of Spofford and Dorius made their way through the courts, the question as to their continued employment at Smith came to the fore. Against the recommendation of the faculty and the President, Smith College trustees insisted that their contracts not be renewed. Since the trustees said that the instructors' dubious convictions for possessing pornography had no effect on their decision, they apparently fired the instructors simply for being exposed as homosexual.

After the trustees reaffirmed their decision on Good Friday, 1961, and departed for church, Nellie Mendenhall, the wife of the college President, remarked, "They had just crucified two guys and were going off to celebrate the crucifixion of another one."

The scandal took an enormous toll on all concerned, perhaps especially on Spofford and Dorius. Happily, the appeals of their sentences were successful. Following some key rulings of the United States Supreme Court regarding both the possession of soft-core pornography and search warrants, the Massachusetts Supreme Judicial Court reversed their convictions in 1963.

Despite being branded as convicts and homosexuals and being forced out of the country to find employment abroad, Spofford and Dorius eventually went on to successful academic careers, Spofford at Stanford University, Dorius at San Francisco State University. Both were deeply scarred by the scandal, Spofford later suffering several breakdowns that were delayed reactions to the events of 1960.

After the publication of Barry Werth's excellent account of the scandal in *The Scarlet Professor: Newton Arvin: A Literary Life Shattered by Scandal* (2001) brought it to wide public attention, the Smith College Board of Trustees, while refusing to apologize to Spofford and Dorius, in effect acknowledged the error of its earlier incarnation in failing to support the instructors. In 2002, the trustees voted to establish the \$100,000 Dorius/Spofford Fund for the Study of Civil Liberties and Freedom of Expression and the Newton Arvin Prize in American Studies.

The scandal may be seen as one of the last gasps of McCarthyism and as a telling reminder of the precariousness of homosexuals in a virulently homophobic culture. Even in the relatively liberal precincts of academia, homosexuals in the 1950s and early 1960s were vulnerable to witch-hunts and morality crusades.

Still, as Werth observes, the scandal occurred at almost the last moment it could have, for with the election of a young, new President in 1960, the beginning of the (heterosexual) sexual revolution, and Supreme Court rulings that protected privacy at least to some degree, the country had turned a corner.

Conclusion

Before and after his sentencing, Arvin sought refuge in the Northampton state mental hospital. He was eventually released and attempted to put his life together. He received a great deal of support from friends across the country, and from some colleagues at Smith, but continued to regard himself as something of a pariah.

Arvin's last years were more productive than one could have predicted. He had just put the finishing touches on *Longfellow: His Life and Work* (1963), agreed to undertake the task of editing an ambitious series of paperbacks on American writers, and had begun an autobiography when he was stricken ill near the end of 1962. He died of pancreatic cancer on March 21, 1963.

It is not clear that Arvin ever acknowledged even to himself any culpability for ensnaring his friends and sexual partners in the Smith College scandal. He thus remains an ambiguous figure. As Caleb Crain describes him, "he was a victim of the closet who cooperated with its enforcers." In so doing, he caused the suffering of others.

After Truman Capote's death in 1984, it was revealed that Capote had left money in his will to establish the Truman Capote Award for Literary Criticism in Memory of Newton Arvin. The Capote-Arvin award (now given both for lifetime achievement and for a particular work of criticism) is by far the most lucrative acknowledgment of excellence in the field of literary criticism.

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